No. 87-6431-CFY
Status: GRANTED

Title: Wayne T. Schmuck, Petitioner
v.
United States

Docketed:
February 16, 1988

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Steinberg,Peter L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Feb 16 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Mar 21 1988		Order extending time to file response to petition until April 16, 1988.
5	Apr 15 1988		Brief of respondent United States filed.
6	Apr 21 1988		DISTRIBUTED. May 12, 1988
8	May 16 1988		Petition GRANTED.
			**********
9	May 18 1988	G	Motion of petitioner for appointment of counsel filed.
10	May 27 1988		DISTRIBUTED. June 2, 1988. (Motion of petitioner for appointment of counsel).
11	Jun 6 1988		Motion for appointment of counsel GRANTED and it is ordered that Peter L. Steinberg, Esquire, of Madison, Wisconsin, is appointed to serve as counsel for the petitioner in this case.
12	Jun 20 1988		Joint appendix filed.
13	Jun 27 1988		Brief of petitioner Wayne T. Schmuck filed.
16	Jul 26 1988		Order extending time to file brief of respondent on the merits until August 12, 1988.
17	Aug 12 1988		Brief of respondent United States filed.
18	Aug 24 1988		Record filed.
		*	Certified original record, 10 volumes, received.
19	Sep 12 1988		Reply brief of petitioner Wayne T. Schmuck filed.
20	Sep 28 1988		CIRCULATED.
21	Sep 30 1988		Set for argument. Wednesday, November 30, 1988. (3rd case) (1 hr.)
22	Nov 30 1988		ARGUED.

87-6431

NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE T. SCHMUCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO

PROCEED IN FORMA PAUPERIS

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(CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE ATTACHED)

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, WAYNE T. SCHMUCK, by and through his attorney, Peter L. Steinberg, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit en banc entered in this matter on January 21, 1988.

A. QUESTIONS PRESENTED FOR REVIEW:

1. Was it error to deny petitioner's request for a jury instruction on odometer tampering, 15 U.S.C. § 1984, as a lesser offense "inherently related" to the charged offense of mail fraud, 18 U.S.C. § 1341, where the abundant references to petitioner's odometer tampering may have influenced the jury to convict him of mail fraud in a weak case, Keeble v. United States, 412 U.S. 205 (1973), United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971)?

2. Was it error to deny petitioner's motion for judgment of acquittal on the charges of mail fraud where the mailing of automobile title documents by the subsequent purchasers of the automobiles in which petitioner had rolled back the odometers were actually counterproductive to his odometer tampering scheme, or at most were routine mailings tangentially related to his scheme, and not in furtherance thereof, United States v. Maze, 414 U.S. 395 (1974), United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977)?

B. PARTIES:

All parties to the proceedings appear in the caption of this petition.

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D. REPORTED OPINIONS BELOW:

This case was initially reported in a panel decision as United States v. Schmuck, 776 F.2d 1368 (7th Cir. 1985). The panel decision was vacated and rehearing en banc was ordered, United States v. Schmuck, 784 F.2d. 846 (7th Cir. 1986). The en banc decision, which petitioner seeks to have reviewed, was issued January 21, 1988, and is reported as United States v. Schmuck,_____ F2d. _____ (7th Cir. 1988).

E. JURISDICTIONAL STATEMENT:

The Judgment Order on Rehearing of the United States Court of Appeals for the Seventh Circuit, reversing the panel decision and affirming petitioner's mail fraud conviction, was entered on January 21, 1988. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of the Supreme Court.

F. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. CONSTITUTIONAL PROVISIONS

(a) No person shall be ... deprived of life,liberty, or property, without due process of law... (United States Constitution, Amendment Five).

(b) In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; ... and to have the Assistance of Counsel for his defense.(United States Constitution, Amendment Six).

(c) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.(United States Constitution, Amendment Eight).

2. STATUTORY PROVISIONS:

(a) Whoever, having devised ... any scheme or artifice to defraud ....., for the purpose of executing such scheme or artifice or attempting to do so, places in any post office

or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or knowingly causes to be delivered by mail ... any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both. (Mail Fraud, 18 U.S.C. § 1341).

(b) No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon. (Odometer Tampering, 15 U.S.C. § 1984).

(c) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter ... shall be fined not more than $50,000 or imprisoned not more than one year, or both. (15 U.S.C. § 1990c, as added Pub. L. 94-364, Title IV, § 408(2), July 14, 1976, 90 Stat. 985)

3. REGULATIONS:

(a) CONVICTION OF LESS OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged .... (Rule 31(c),F.R. Crim. P.)

(b) MOTION FOR JUDGMENT OF ACQUITTAL.
(a) Motion before Submission to Jury. ... The court on motion of a defendant ... shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty ..., a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged.... If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.... (Rule 29(a) & (c), F.R. Crim. P.)

(c) INSTRUCTIONS. At the close of the evidence ... any party may file written requests that the court instruct the jury on the law as set forth in the requests.... (Rule 30, F.R. Crim. P.).

G. STATEMENT OF THE CASE.

The facts of this appeal are not in dispute. Petitioner was engaged in a fraudulent scheme involving the sale of used cars with their odometers rolled back. He was indicted on August 23, 1983 in the United States District Court for the Western District

of Wisconsin on twelve counts of violating 18 U.S.C. § 1341, prohibiting mail fraud. Jurisdiction in the District Court was based on 18 U.S.C. § 3231.

The mail fraud charges hinged on the fact that after Petitioner sold the cars, the new owners mailed the title documents into the Wisconsin Department of Motor Vehicles in order to record the change in ownership. Petitioner raised the question of whether these mailings were so tangential to his scheme that they could not support a mail fraud conviction, by filing a motion to dismiss the indictment, citing United States v. Maze,414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974).

The District Court denied the motion to dismiss on November 11, 1983, by written order which appears in the Appendix to this petition at p. XLVI (hereinafter App.). The Court interpreted Maze,supra, as holding that mailings which enhance the probability of detection are not "furthering" a scheme, and cannot support a mail fraud charge. However, the Court ruled that the jury should decide whether the mailings in question furthered the scheme.

The indictment against petitioner charged him, in Paragraph Four, with actions that constituted a violation of 15 U.S.C. § 1984, prohibiting odometer tampering. (The indictment appears at App. p. XLII) At the final pretrial conference, petitioner requested that an instruction be given to the jury on odometer tampering as a lesser included offense, relying on the existence of an inherent relationship between the lesser offense, odometer tampering, and the greater offense, mail fraud. The doctrine of "inherent relationship" allows conviction of a lesser offense even where the lesser offense includes elements not required for proof of the greater offense, and has been accepted as the better

rule by the District of Columbia Circuit, (United States v. Whitaker, 447 F.2d 314 (1971), the Tenth Circuit, (United States v. Pino, 606 F.2d 908 (1979), and the Ninth Circuit, (United States v. Johnson, 637 F.2d 1224 (1980). Sometimes the inherent relationship rule benefits the prosecution, vid. United States v. Cova, 755 F.2d 595 (7th Cir. 1985),United States v. Stolarz, 550 F.2d 488 (9th Cir. 1977), cert. den., 434 U.S. 851, 98 S.Ct. 162, 54 L.Ed.2d 119 (1977), United States v. Cooper,812 F.2d 1283 (10th Cir. 1987), United States v. Martin, 783 F.2d 1449 (9th Cir. 1986). The District Court denied the request for the lesser included offense instruction, but did grant petitioner's request to let the jury decide whether the mailings in question actually furthered his scheme. (The final pretrial conference order, of December 16, 1983, appears at App. p. XLVIII).

During the presentation of the Government's case, petitioner's counsel brought out the fact that the documents which were mailed in almost every case actually contained the falsified odometer reading, so that a simple comparison of the mailed documents with the odometer statements from the prior car owners demonstrated petitioner's fraud. At the close of the Government's case, petitioner moved for judgment of acquittal under F.R. Crim. P. 29(a). Petitioner relied on United States v. Maze,supra, and a Seventh Circuit case, United States v. Galloway, 664 F.2d 161 (1981). Galloway was another mail fraud prosecution grounded in an odometer tampering scheme, differing only in the circumstance that the mailings in Galloway did not contain odometer readings. The same District Court Judge in the present case, the Honorable Barbara B. Crabb, had presided over the trial in Galloway, and had granted a directed verdict of not guilty in that case, relying on Maze. The Court of Appeals

reinstated the conviction in Galloway, but suggested in a footnote that had the mailings contained odometer readings, detection of Galloway's scheme might have been rendered more likely by the mailings, which would bring them within the scope of Maze.

The motion for judgment of acquittal was denied, and petitioner presented his evidence, tending to show how the mailings in question helped to uncover his scheme. Prior to counsels' arguments, the government requested a motion in limine prohibiting petitioner's counsel from arguing to the jury that petitioner had committed odometer tampering, but not mail fraud on the grounds that such an argument was a back door way of introducing the lesser included offense. The Court granted the motion. During rebuttal the prosecutor suggested to the jury that the defendant would escape punishment for his odometer tampering if he was acquitted of the instant charges.

A verdict of guilty on all twelve counts in the indictment was returned on December 20, 1983, and petitioner renewed his motion for a judgment of acquittal, or in the alternative for a new trial. Petitioner argued that the Court, by denying the lesser included offense instruction, yet permitting the government to introduce a great deal of evidence relevant to odometer tampering, had allowed the government to bolster a weak mail fraud case by appealing to the jury's hostility to odometer tampering. The motion for judgment of acquittal or for a new trial was denied by the Court on December 29, 1983.(The order appears at App. p. L). Petitioner was sentenced on February 24, 1984, to 90 days in jail and fined $550.00, and placed on probation for four years. (The judgment of conviction and sentence appear at App. p. LII.) Petitioner filed a notice of

appeal the same day, and execution of sentence was stayed pending appeal to the Court of Appeals for the Seventh Circuit, where jurisdiction was based on 28 U.S.C. § 1291.

Petitioner's appeal raised seven related issues, but the basic points were that the mailings in question were too counterproductive or tangential to his scheme to fairly support a charge of mail fraud, United States v. Maze,supra, and that the government used the fact that petitioner had engaged in odometer tampering to lower its burden of proof, leading the jury to convict him of mail fraud in a doubtful case rather than let an acknowledged odometer tamperer go free, Keeble v. United States,412 U.S. 205, 93 S.Ct.1993, 36 L.Ed.2d 844 (1973). The lesser included offense instruction would have been an appropriate way of preventing this appeal to jury prejudice.

Petitioner's appeal was argued orally on September 13, 1984. On November 12, 1985, the three judge panel reversed petitioner's conviction and ordered a new trial, ruling by a split decision that petitioner should have been afforded the lesser included offense instruction. (The panel decision appears at App. p. XXVIII). The decision is reported at United States v. Schmuck, 776 F.2d 1368 (7th Cir. 1985). The panel accepted petitioner's argument that the law of the Seventh Circuit applied the "inherent relationship" test for lesser included offense instructions, and found that a genuine issue of fact existed as to whether the mailings in question furthered the fraudulent scheme or were counterproductive or merely tangential to the scheme. The panel relied on United States v. Cova, 755 F.2d 595 (7th Cir. 1985), which used the "inherent relationship" rule to uphold a conviction for a lesser offense that did not fit within the greater offense under the traditional "elements" test. Judge

Flaum, who sat on the panel in Cova, also sat on the panel in petitioner's case, and voted to apply the "inherent relationship" rule in both cases, although in Cova it was the government that benefitted by the application of the rule, and in the present case it was the petitioner who benefitted.

After the panel decision, the government requested a rehearing en banc. The request was granted (United States v. Schmuck, 784 F.2d 846 (7th Cir. 1986), and oral argument before the en banc panel was heard on June 9, 1986. (The order for rehearing appears at App. p. XXV). The argument focused on whether the "inherent relationship" test or the "elements" test should be used in determining a lesser or necessarily included offense under F.R. Crim. P. 31(c). On January 21, 1988, the en banc Circuit reversed the panel decision and affirmed the conviction, expressly rejecting the "inherent relationship" test, and overruling Cova,supra. Judge Flaum, joined by Judge Cudahy, dissented, arguing for application of the "inherent relationship" rule as the established law of the circuit, and the better rule. Chief Judge Bauer, the author of the decision in Cova applying the "inherent relationship" test, and Judge Coffey, the third panel member in Cova, joined in rejecting the "inherent relationship" test in the present case, without explaining why their opinion on this question had changed. (The en banc opinion appears at App. p. III).

Petitioner seeks review of the decision of the Court of Appeals on the question of the sufficiency of these facts to support a mail fraud conviction under United States v. Maze,supra, and the question of the appropriate test under F.R.Crim.P. 31(c) for the giving of a lesser included offense instruction, where there is a possibility of jury hostility to

the lesser offense causing conviction of the greater offense in a weak case, Keeble v. United States,412 U.S. 205, 93 S.Ct.1993, 36 L.Ed.2d 844 (1973).

H. REASONS FOR GRANTING THE WRIT.

1. REVIEW WILL RESOLVE THE CONFLICT WITHIN THE CIRCUIT COURTS OF APPEAL OVER THE "INHERENT RELATIONSHIP" TEST VS. THE "ELEMENTS" TEST FOR LESSER INCLUDED OFFENSES.

a) A conflict exists within the Circuits.

The opinions in the present case describe the current split in authority between use of the "inherent relationship" test and the "elements" test in applying F.R.Crim.P. 31(c).

The "inherent relationship" rule, established in the D.C. Circuit by United States v. Whitaker, 447 F.2d 314 (1971), is also followed in the 10th Circuit, vid. United States v. Pino, 606 F.2d 908 (1979), United States v. Cooper, 812 F.2d 1283 (1987), United States v. Burns, 624 F.2d 95 (1979), and the 9th Circuit, vid. United States v. Johnson, 637 F.2d 1224 (1980), United States v. Martin, 783 F.2d 1449 (1986), United States v. Stolarz, 550 F.2d 488(1977). 1982).

The "elements" test is adhered to in the 8th Circuit, vid. United States v. Campbell, 652 F.2d 760 (1981), United States v. Iron Shell, 633 F.2d 77 (1980), and the 3rd Circuit, vid. Government of the Virgin Islands v. Parrillo, 550 F.2d 879 (1977).

The Seventh Circuit, in rejecting the "inherent relationship" test, overruled a line of cases applying the test, including United States v. Cova, 755 F.2d 595 (7th Cir. 1985) and United States v. Stavros, 597 F.2d 108 (7th Cir. 1979).

As Judge Flaum points out in his dissent in the present

case, various "umbrella-like" statutes, such as the mail fraud statute in the present case, are predicated on other, broadly defined, types of criminal conduct. In such cases, the "inherent relationship" test will allow a lesser offense instruction, where the "elements" test typically will not allow the instruction. This state of affairs is unsatisfactory, since it means that a criminal defendant's right to the instruction depends on the fortuitous circumstance of the venue of his case. The only way to resolve the conflict is for this High Court to indicate which rule should prevail.

b) The "inherent relationship" test is a better rule, because it meets the due process concerns of Keeble v. United States,412 U.S. 205 (1973) better than the "elements" test does, as is seen in the present case.

The custom of charging the jury that it might convict a defendant of a lesser offense, if unable to convict him of the offense with which he was charged, originated in the common law of England as an aid to the prosecution, Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973), Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), 2 C.Wright, Federal Practice and Procedure-Criminal § 515 (1969). It arose in situations where the prosecution, apprehensive of the possibility of acquittal, applied the maxim "a half a loaf is better than none". If the prosecution proved some of the elements of the offense charged, but not all elements, and if the elements that had been proved themselves constituted a crime, the jury was permitted to convict the defendant of the proven crime, rather than let a proven criminal go free.

Since the rule, in theory, operated against the defendant, the right of the prosecution to seek instructions on a given

offense came to be limited by the concept of fair notice to the defendant of the possibility of the conviction of a lesser offense. Defendants therefor have argued that it is improper to convict them of a lesser crime if proof of that crime requires some element not required for proof of the crime charged in the indictment, vid. United States v. Cova, 755 F.2d 595 (7th Cir. 1985),United States v. Stolarz, 550 F.2d 488 (9th Cir. 1977), cert. den., 434 U.S. 851, 98 S.Ct. 162, 54 L.Ed.2d 119 (1977), United States v. Cooper, 812 F.2d 1283 (10th Cir. 1987), United States v. Martin, 783 F.2d 1449 (9th Cir. 1986).

In the Federal Circuits that follow the "inherent relationship" rule, these convictions were upheld, although under the "elements" rule they were improper. The Courts looked to the indictment to decide what the defendants were fairly on notice of. It is the indictment that provides notice to the defendant of what acts he is accused of,as well as what statutes his acts allegedly violate, and where the facts alleged in the indictment constitute all the elements of the lesser offense, adequate notice has been given to the defendant.

Although the lesser included offense arose as an aid to the prosecution, defendants came to rely on it in cases where the jury might be influenced to convict them of a more serious crime due to the prosecution's introduction of evidence proving a lesser crime. In Keeble v. United States, supra, this Court established "beyond dispute" that the defendant had a right to a lesser included offense instruction where the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater. The reasoning of Keeble was that, although the jury in theory should acquit the defendant where the prosecution has not proven all of the elements of the crime

beyond a reasonable doubt, in practice there is a substantial risk that:

> Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction, Keeble,supra, at 412 U.S. 204-205).

The danger to the defendant arises from the jury hearing proof of the uncharged crime, and being swayed against the defendant as a result. In measuring the actual risk of an unfair conviction, then, one must look at what the jury heard, and not simply at the abstract elements of the relevant offenses. The same reasoning was applied by this Court in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980):

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction, id. at 447 U.S. 637.

In the present case, the jury was provided with a superfluity of information regarding petitioner's odometer tampering activities, over the objection of petitioner. During voir dire, close to half of the panel of prospective jurors said that they had read or heard about odometer tampering in the media, 5 had had trouble buying used cars, and 2 were excused because they felt that they could not be impartial in a case involving odometer tampering. Over petitioner's objection, the jury was informed that he had sold many other cars with rolled back odometers, in addition to the ones charged in the indictment, and the ultimate purchasers of the cars listed in the indictment testified as to the mechanical troubles that they had

had with their cars.

Despite this continual linking of petitioner to odometer tampering, the jury was given a choice only of convicting him of mail fraud, or setting him free. The jury may well have been unaware that odometer tampering constituted a federal offense with which petitioner could have been charged, since the District Court denied proposed instructions that would have told the jury of the existence of the offense, and prohibited petitioner's attorney from mentioning it during jury argument. Yet the District Court and the Court of Appeals agreed that petitioner's defense to mail fraud depended on the jury considering whether the mailings in question furthered his odometer tampering scheme, or were counterproductive, or merely tangential, to it. As Judge Flaum points out in his dissent to the en banc opinion:

> In his motion for a directed verdict, the defendant argued that the odometer readings in the title forms mailed in his case(the existence and inclusion of which were not disputed) made them counterproductive to his scheme as a matter of law. The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury. It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction. The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the fraudulent car sale scheme. Because this rational possibility existed in the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering,United States v. Schmuck,_____F.2d_____(7th Cir. 1988), slip opinion p. 21.

The majority opinion in the present case simply fails to address the due process concerns expressed in Keeble and Beck, supra. There is no discussion of whether the abundant proof of odometer tampering might have influenced the jury to convict in a

doubtful case, cf. Nichols v. Gagnon, 710 F.2d. 1267 (7th Cir. 1983). Even the prosecutor's argument to the jury, suggesting that the petitioner should be convicted, because if acquitted, he would have evaded punishment for his odometer tampering activities, is accepted without remark.

The reasons advanced by the majority for applying the "elements" test, rather than the "inherent relationship" test, are not persuasive. The majority expresses concern about the petitioner's right to notice of the possible lesser offense requiring an abandonment of mutuality, but as the cases cited above demonstrate, the "inherent relationship" rule actually expands the government's ability to charge lesser offenses over the objections of defendants, vid. United States v. Cova, etc., supra.

The majority also considers the application of the "elements" test simpler, and therefor more certain and predictable. However, simplicity of use does not justify a rule that works substantial injustice. In addition, the "elements" test itself can lead to contradictory results in similar cases, as can be seen in the annotation on lesser included offenses at 11 A.L.R. Fed. 173, What Constitutes Lesser Offenses "Necessarily Included" in Offense Charged, Under Rule 31(c), F.R.Crim.P. In cases involving "dragnet" statutes, like mail fraud, RICO, and Continuing Criminal Enterprise, the "elements" test will operate like the bed of Procrustes, ensuring the rejection of lesser offense instructions, no matter how doubtful the proof of the greater charge, or how prejudicial the proof of the lesser, uncharged crime. As Judge Flaum points out in his dissent, there is no compelling reason to adopt an "antiseptic and unworldly formula" which will come to hinder

defense and prosecution alike.

2. REVIEW IS NEEDED UNDER THIS COURT'S SUPERVISORY POWER TO ESTABLISH RESPECT FOR THE PRINCIPLE OF STARE DECISIS.

The principle of stare decisis expresses a social need that points of law, once settled, should not be changed, absent convincing reasons for overruling them. The principle is central to the orderly development of the law, see 3 Moore's Manual Federal Practice and Procedure § 30.04 (1987). As stated in Moore's, "routine reconsideration of the correctness or propriety of binding precedents would be enormously destructive", id. at 3 Moore's p. 30-11. The legitimate expectations of parties that the same law shall prevail for litigants with similar claims, or the right to equal treatment before the law, is implicated in the doctrine.

In the instant case, the Court of Appeals reversed the settled law of the Seventh Circuit regarding lesser included offenses. As far back as United States v. Stavros, 597 F.2d 108 (7th Cir. 1979), the Seventh Circuit has looked beyond the "elements" of the offense in deciding whether an offense constituted a lesser included offense. Judge Fairchild, author of the majority opinion below, joined in the ruling in Stavros. In United States v. Cova, 755 F.2d 595 (7th Cir. 1985), decided in the same year as the panel decision in the present case, Chief Judge Bauer, joined by Judge Coffey and Judge Flaum, applied the "inherent relationship" test for the benefit of the government.

In Cova, Judge Bauer wrote:

> In determining whether an offense is included in a greater offense, a court should not be limited to consideration of only the language of the statute under

> which the defendant was charged because a statute may be violated in different ways. Stavros, 597 F.2d at 112. Accordingly, this circuit has also considered the facts alleged in the indictment, Stavros, 597 F.2d at 112, and the evidence presented at trial, United States v. Johnson, 506 F.2d 305 (7th Cir. 1974 (per curiam), cert. den., 420 U.S. 1005, 95 S.Ct. 1448, 43 L.ed.2d 763 (1975), in determining whether a lesser included offense instruction was proper, id. at 755 F.2d 596.

Surely it was incumbent upon these judges to explain why their opinion as to the proper law of the circuit had changed so dramatically, in so short a period of time. By applying a different rule in the present case than was applied in Cova, the government won both cases, even though both cases were commenced, and tried, at the same time.

3. THE COURT OF APPEALS SHOULD HAVE APPLIED THE RULING OF THIS COURT IN UNITED STATES V. MAZE, 414 U.S. 395 (1973), TO THE FACTS OF THIS CASE.

From the commencement of this case, petitioner has consistently asserted that his actions, as a matter of law, could not constitute mail fraud, because the mailing of title documents by the victims of his odometer tampering scheme were counterproductive to his scheme, or at most routine mailings, intrinsically innocent, relying on United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), and United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977). However, this argument was rejected on the authority of United States v. Galloway, 664 F.2d 161 (7th Cir. 1981).

Petitioner feels, like the dissent in Galloway, that the circumstances of this case are sufficiently close to Maze as to be indistinguishable. Thomas Maze went on an interstate spree

with stolen credit cards, and was convicted of mail fraud based on the mailing of sales slips by the merchants that he defrauded. This Court considered the question of whether these mailings were sufficiently closely related to his scheme to bring his conduct within the mail fraud statute, and decided that they were not. As Justice Rehnquist observed:

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all, Maze at 414 U.S. 402.

When a car is sold with a tampered odometer, the illicit gain is realized before the title transfer is ever recorded. As the testimony in the present case established, laws requiring the registration of title transfers, including reporting odometer readings, fulfill an important purpose in helping detect and record the perpetration of frauds. Like Maze, the petitioner would have been better off if the title documents had never been mailed in at all. If the routine mailing of title documents raises odometer tampering to the level of mail fraud, then odometer tampering will always be prosecutable as mail fraud.

This Court has had occasion in recent years to consider the proper scope and application of the mail fraud statute, and it is plain that a practical, common sense approach to this question is preferred. Compare McNally v. United States, 483 U.S. ____, 97 L.Ed.2d 292, 107 S.Ct. ___ (1987) (Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of fraudulent schemes) with Carpenter v. United States, 484 U.S. ____, 98 L.Ed.2d 275, 108 S.Ct. ___(1987) (Circulation of newspaper column through mails and wire service

was essential to produce profit from scheme), and United States v. Lane, 474 U.S. 438, 88 L.Ed.2d 814, 106 S.Ct. 725 (1986) (mailings had "lulling" effect).

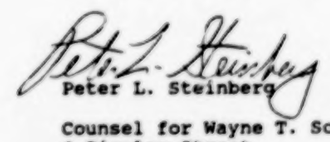
Applying these principles to the present case, the mailing of the title documents to the Wisconsin Department of Motor Vehicles did nothing to assist petitioner, and had a great deal to with his getting caught.

4. CONCLUSION

Petitioner seeks a writ of certiorari to review his convictions because, although he was admittedly guilty of odometer tampering, he was not guilty of mail fraud, and was only convicted of mail fraud because the jury was forced to choose between conviction for mail fraud, or complete acquittal. Had the jury been properly instructed, he would only have been found guilty of odometer tampering. For the foregoing reasons, the writ should issue, and petitioner's convictions should be reversed outright, or a new trial granted.

Dated: February 11, 1988.

Respectfully submitted,



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I. APPENDIX.

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JUDGMENT ORDER ON REHEARING

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 21, 1988 ✓

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1317 vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83 CR 56
BARBARA B. CRABB, Judge.

This cause was reheard on the record from the United States District Court for the Western District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1366. Because of illness, however, he has not participated further.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1317

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WAYNE T. SCHMUCK,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 83 CR 56—**Barbara B. Crabb**, *Judge.*

REHEARD *EN BANC* JUNE 9, 1986—DECIDED JANUARY 21, 1988

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges*, and SWYGERT* and FAIRCHILD, *Senior Circuit Judges.*

FAIRCHILD, *Senior Circuit Judge.* In *United States v. Schmuck*, 776 F.2d 1369 (7th Cir. 1985), a divided panel decided that under the facts of this mail fraud prosecution, the offense of knowing and willful odometer alteration was a lesser included offense within the charged offense of

* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1369. Because of illness, however, he has not participated further.

mail fraud. Defendant's conviction was reversed, therefore, because it was error to refuse an instruction under Rule 31(c), F. R. CRIM. P., on the possibility of finding defendant guilty of the odometer offense. Although odometer alteration is not a statutory element of mail fraud, the panel, relying on *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), held that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. 776 F.2d at 1371. Accordingly the odometer offense proved by the evidence constituted a lesser included offense for the purpose of Rule 31(c).

The panel decision was vacated and rehearing *en banc* granted. *United States v. Schmuck*, 784 F.2d 846 (7th Cir. 1986). We now reject the *Whitaker* doctrine and decide that the odometer offense, though proved, was not a lesser included offense, or, as Rule 31(c) says "an offense necessarily included in the offense charged." All other significant claims raised were correctly decided adversely to defendant in Part I of Judge Swygert's opinion, 776 F.2d at 1369-70. We now adopt Part I and affirm.

I

Defendant Schmuck was convicted, after a jury trial, of 12 counts of mail fraud. Each count of the indictment alleged a scheme by Schmuck to defraud purchasers of used automobiles by representing that the automobiles had substantially less mileage than was true. Schmuck would purchase automobiles, cause their odometer readings to be altered, offer them to dealers, and provide purchasing dealers with an odometer statement reflecting the false mileage. The dealers would sell the cars to retail customers. Both the dealers and the customers would rely on the false readings and pay more than if readings had not been reduced. In order to obtain titles in the names of their customers, the dealers would mail Wisconsin title applications to the Wisconsin Department of Transportation. Each count of the indictment alleged the mailing of an application for title for an automobile by a dealer on

a specified date. Five different dealers were named; three dealers made only one mailing, one made four, and one five. It was charged that Schmuck caused each mailing for the purpose of executing the scheme.

Pursuant to Rule 31(c), defendant moved prior to trial for an instruction that would have permitted the jury to convict him of odometer alteration as a lesser included offense of mail fraud, presumably on each count. That motion was denied. He was convicted and appealed.

In reversing and remanding for a new trial, the panel rejected the "traditional" definition of a lesser included offense, in favor of the "inherent relationship" approach first expounded in *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The traditional (elements) test requires identity of the elements of the two offenses, such that some of the elements of the crime charged themselves comprise a separate, lesser offense; to be necessarily included, the elements of the lesser offense must be a subset of the elements of the charged offense. *See Sansone v. United States*, 380 U.S. 343, 349-50 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of the Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3rd Cir. 1977). Thus where the lesser offense requires an element not required for the greater offense, an instruction should be refused.[1]

[1] Several courts have listed five conditions to be met where a Rule 31(c) instruction is requested. The second is "the elements of the lesser offense must be identical to part of the elements of the greater offense" and the fifth "in general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded by either the prosecution or defense." *Whitaker*, 447 F.2d at 317; *United States v. Campbell*, 652 F.2d 760, 761 (8th Cir. 1981); *United States v. Chapman*, 615 F.2d 1294, 1299 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980); *but see* n.5 *infra*, as to Tenth Circuit position. Another formulation is that the lesser offense must be such that it is impossible

(Footnote continued on following page)

Broadly speaking, there are two elements of an offense under the mail fraud statute: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts); and (2) use of mail for the purpose of executing the scheme or attempting to do so.[2] It is not required that any part of the contemplated scheme be performed, although in practice fraudulent conduct usually is proved in order to establish the scheme. The odometer offense consists of knowingly and willfully altering or causing alteration of an odometer with intent to change the number of miles indicated.[3] Each statute requires proof

[1] *continued*

to commit the greater offense without having committed the lesser. *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 554 (3rd Cir. 1967). "The lesser included offense doctrine does not apply where the lesser offense includes an element, such as possession, not required for the greater offense." *Campbell*, 652 F.2d at 761.

[2] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] 15 U.S.C. § 1984 provides:

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

§ 1990c(a) prescribes a misdemeanor penalty for knowing and willful violation of any provision of the subchapter, including § 1984.

of facts not required by the other. The two offenses are separate. *Blockburger v. United States*, 284 U.S. 184, 187-88 (1957).

In determining, for this purpose, the elements of the offense charged, the ordinary focus is upon the statute defining the offense. Where the statute prescribes an element in general language, capable of wide variation in types of conduct, e.g., mail fraud, falsification (18 U.S.C. § 1001), continuing criminal enterprise (21 U.S.C. § 848), RICO (18 U.S.C. § 1963), failure to perform any of several types of statutory duty (e.g., 26 U.S.C. § 7203) there is logical appeal for the proposition that the terms of the indictment will narrow the scope of the elements to be examined. *See United States v. Stavros*, 597 F.2d 108, 110 (7th Cir. 1979); *but see United States v. Kimberlin*, 781 F.2d 1247, 1257 n.10 (7th Cir. 1985). Given the present indictment, however, alleging as one element devising a scheme to defraud purchasers of automobiles with altered odometers, knowingly and willfully causing an odometer to be altered is not identical to the element of having devised the scheme.

The District of Columbia Circuit rejected strict comparison of elements in favor of inquiry whether there was an "inherent relationship" between the crime charged and a lesser offense proved at trial. The defendant in *Whitaker* had been charged with first degree burglary, and his request for an instruction permitting conviction of the lesser offense of unlawful entry was denied, because the District of Columbia Code did not exclusively require unlawful entry as an element of first degree burglary, and therefore unlawful entry would not be a lesser included offense under the traditional test. However, because the proof showed that defendant had, in fact, committed the burglary by means of an unlawful entry, in reversing and remanding for a new trial, the court held that

> [a] more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense

> is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

447 F.2d at 319.

The *Whitaker* court went on to note that the Constitution and the common law require that the charge in the indictment give the defendant notice that he could also be convicted of any lesser included offenses, if the evidence so warrants. The prosecution as well as the defendant may seek an instruction pursuant to Rule 31(c) under the traditional test, because all elements of the lesser included offense have, by definition, been charged. *Whitaker* dispensed with the mutuality requirement, because of "considerations of justice and good judicial administration. . . . [T]he defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right . . . [and] doubt as to whether the prosecution could rightfully have requested such a charge should not bar the charge being given at the request of the defense." *Id.* at 321.

Applying the *Whitaker* approach, the panel in the present case concluded that

> there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. . . . [I]t can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. . . . An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

776 F.2d at 1371.

Having found the requisite relationship between odometer alteration and mail fraud, the panel turned to the second requirement of the right to a lesser included offense instruction: whether the proof of the element necessary for the greater crime but not for the lesser crime is sufficiently in dispute so that a rational jury could find the defendant not guilty of the greater but guilty of the lesser. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Sansone v. United States*, 380 U.S. 343, 350 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). Whatever the test used to determine whether one offense is included within another, there is agreement that there must be a separable issue in the case as to the distinguishing element. *Cf., e.g., United States v. Pino*, 606 F.2d 908, 917 (10th Cir. 1979) (inherent relationship approach) with *United States v. Campbell*, 652 F.2d 760, 763 (8th Cir. 1981) (traditional test). The panel held that the jury could have rationally found that the mailings were counterproductive to the fraud because they brought the fraudulent readings to the authorities' attention, or that the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme.

II

A. Rule 31(c)

We reject the inherent relationship test,[4] and hold that an offense is necessarily included within another for the purpose of Rule 31(c) only when the elements of the lesser offense form a subset of the elements of the charged of-

[4] The author of this opinion also adheres to his previously expressed view that there is no inherent relationship between odometer alteration and mail fraud even if the *Whitaker* doctrine were to prevail. 776 F.2d at 1373-75, Fairchild, *J.*, concurring in part, dissenting in part.

fense.[5] The elements approach is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for

[5] The Second Circuit states the test in terms of elements. *See United States v. Lo Russo*, 695 F.2d 45, 52 n.3 (2d Cir. 1982), *cert. denied sub nom. Errante v. United States*, 460 U.S. 1070 (1983). We have found no case, however, where the Second Circuit has rejected the *Whitaker* approach. The Third Circuit states the elements test and asserts specifically "[t]he elements of the offense are compared *in the abstract*, without looking to the facts of the particular case." *Government of Virgin Islands v. Joseph*, 765 F.2d 394, 396 (3rd Cir. 1985). The Eighth Circuit has adhered to the elements test, noting, but taking no position on, the question of abandoning mutuality. *United States v. Campbell*, 652 F.2d 760, 762-63 (8th Cir. 1981).

Decisions of the Fourth Circuit, *see United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976), and the Fifth Circuit, *see United States v. Williams*, 775 F.2d 1295, 1302 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1477 (1986), are consistent with the elements approach.

Circuits adopting the inherent relationship test are the District of Columbia, *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971); and the Ninth, *United States v. Martin*, 783 F.2d 1449, 1451-53 (9th Cir. 1986).

The Tenth Circuit adopted the *Whitaker* doctrine in a 1979 decision, *United States v. Pino*, 606 F.2d 908, 914-17 (10th Cir. 1979). In a 1980 decision, the court stated the traditional test, including the requirement of mutuality. *United States v. Chapman*, 615 F.2d 1294, 1298-99 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980). In 1982, the court applied the *Whitaker* doctrine, *citing Pino*, but not *Chapman*. *United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir.), *cert. denied sub nom. Porter v. United States*, 464 U.S. 828 (1983). *Zang* happened to be a prosecution for mail fraud. The scheme to defraud involved overcharging for crude oil by miscertification of the "tier" of the oil. Such miscertification was a violation of EPA regulations, and the court found this violation was not a lesser included offense because there was no inherent relationship between it and mail fraud. In 1987, the Tenth Circuit relied on *Pino* and *Whitaker* in affirming the conviction of a lesser offense, one element of which was not included in the offense charged. *USA v. Cooper*, 812 F.2d 1283 (10th Cir. 1987). The dissenting judge would approve the *Whitaker* doctrine where a defendant requested the instruction, but concluded that in the case before the court, defendant had been convicted of an offense not charged.

conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of "necessarily included" under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy.

Although the Supreme Court has not spoken directly to this issue,[6] we believe that decisions involving Rule 31(c) motions suggest the Court's adherence to the traditional method. In *Keeble v. United States*, 412 U.S. 205 (1973), the Court held the defendant entitled to an instruction on a lesser included offense. The Court compared the statutory elements of the offense charged—assault with intent to commit serious bodily injury—with those of the offense on which an instruction was sought—simple assault—stating

> an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.

Id. at 213. The Court did note the *Whitaker* decision and that it had dispensed with mutuality as a necessary prerequisite to the defendant's right to a lesser included offense instruction. The Court found it unnecessary to decide that question. *Id.* at 214 n.14.

Similarly, in *Sansone v. United States*, 380 U.S. 343 (1965), the elements of violation of § 7201 of the Internal Revenue Code of 1954, willful tax evasion, were compared with those of § 7207, willful filing of a fraudulent or false return, and § 7203, willful failure to pay taxes when required, to determine whether the latter misdemeanors were offenses included within the felony charged under

[6] The Court has articulated a statutory elements test for a lesser included offense for double jeopardy purposes. *See, infra*, pp. 12-13.

§ 7201. The Court determined that petitioner was not entitled to a lesser included offense instruction because on the facts of the case, the three statutes covered the same ground. The Court said that "§ 7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses" and instruction should be given if a jury could rationally find that "although all the elements of § 7201 have not been proved, all the elements of one or more lesser offenses have been" proved. *Id.* at 351; *see also Berra v. United States*, 351 U.S. 131, 134 (1956) ("where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction").

These cases counsel in favor of the elements test because the Court examined and compared statutory elements in deciding whether the lesser offense was necessarily included in the offense charged. The decisions nowhere suggest any different inquiry into the relationship between offenses, nor any relaxation of the traditional test where a lesser offense proved could be deemed inherently related to the charged offense.

The statutory elements test is also faithful to the text of Rule 31(c), where the critical phrase is "necessarily included in the offense charged." The inherent relationship approach in effect reads out "necessarily included in" and substitutes something like "factually related to and serves the same policy goals as" the charged offense. Neither the court in *Whitaker* nor any decision adopting its analysis has addressed how the language of the Rule gives rise to the inherent relationship test.

The text of the Rule makes no distinction between a motion made by the defendant or by the government. Yet the inherent relationship approach requires that motions by the government and the defendant be treated differently, because the charge of the greater offense does not give notice that defendant is facing a charge of a lesser offense all the elements of which are not identical to ele-

ments of the charged offense. If the determination whether the crimes are sufficiently related is not made until all the evidence is developed at trial, the defendant may not have had notice constitutionally sufficient to support an instruction at the prosecution's request. Thus, the relationship test dispenses with the requirement of mutuality without explaining how the text of the Rule supports a different result depending upon who makes the motion.

Moreover, the history of the Rule suggests that it codified the traditional approach. "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Beck v. Alabama*, 447 U.S. 625, 633 (1980); *United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *see* 2M Hale, Pleas of the Crown 301-02 (1736); *Rex v. Withal & Overend*, 168 Eng. Rep. 146 (1772). In 1872, this concept was enacted as a statute,[7] now contained in Rule 31(c). The advisory Committee Notes state that the Rule is a "restatement of existing law." *See Keeble*, 412 U.S. at 208 n.6. Thus, there is no indication that the Rule was intended to abrogate the traditional approach to lesser included offenses, including the availability of an instruction in aid of the Government, nor can the Supreme Court's recognition of the defendant's right to an instruction be read as an endorsement of any nonmutual restrictions on the Government.

A significant consideration is the inherent relationship test's lack of certainty and predictability. *See United States v. Johnson*, 637 F.2d 1224, 1238 (9th Cir. 1980) (statutory approach "may be appealing in its promise of certainty and intellectual purity"). Finding an inherent

[7] "[I]n all criminal cases the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment. . . ." 17 Stat. 197, 198 (1872).

relationship requires a determination that the offenses relate to the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. *Whitaker*, 447 F.2d at 319. These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ.

Another problem with relaxation of the traditional test is that relaxation may well permit defendants to seek a lenient outcome by requesting a lesser included offense instruction on every lesser offense that could possibly be made out from the evidence. This tendency to misuse the Rule was recognized in *Whitaker*, and is the reason why the *Whitaker* court required that there must be an inherent relationship between the lesser offense and the offense charged. 447 F.2d at 319.

We find, on balance, no persuasive reason to substitute the *Whitaker* doctrine for the traditional approach.[8]

B. Double Jeopardy and Cumulative Punishment.

Rule 31(c) uses the language, "an offense necessarily included in the offense charged." Many of the decisions on a Rule 31(c) problem use the term "lesser included of-

[8] In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), defendants were charged with conspiracy to distribute cocaine. The district court found insufficient evidence, but submitted an amended charge of conspiracy to possess, and defendants were convicted. Although there was no discussion of *Whitaker*, this court affirmed, holding that conspiracy to possess (proved) was a lesser included offense of the charged conspiracy to distribute. *Id.* at 599. Because it is possible for persons acquiring lawful possession to conspire to distribute, the elements test seems not to have been fulfilled. To the extent that *Cova* stands for a permitted departure from the elements test, it is overruled. *See also* reference to *Cova* in *United States v. Kimberlin*, 781 F.2d 1247, 1256-57, and n.10.

fense." The "lesser included offense" concept is also significant in determining certain claims of double jeopardy or unlawful cumulative punishment. *See Brown v. Ohio*, 432 U.S. 161 (1977).

It seems desirable that, as nearly as possible, the terminology should have the same meaning in both contexts. Using the elements test for Rule 31(c) problems at least approaches keeping the same meaning.

It is at least arguable that in the double jeopardy and cumulative punishment contexts the requisite identity of elements is to be determined solely from comparison of the two statutes, and that the indictment does not narrow the type of elements to be examined. *Brown*, 432 U.S. at 168; *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Woodward*, 469 U.S. 105, 108; *United States v. Kimberlin*, 781 F.2d 1247, 1255-57 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 419 (1986). The focus is "on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Illinois v. Vitale*, 447 U.S. 410, 416 (1980). We need not decide in the case before us whether the allegations of the indictment will properly narrow the scope of the statutory elements to be examined in a given case.

The judgment appealed from is AFFIRMED.

FLAUM, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, dissenting.

I do not agree with the majority's conclusion that the use of the "inherent relationship" test in determining when to give a lesser included offense instruction contravenes either the language or purpose of Federal Rule of Criminal Procedure 31(c). Accordingly, I would leave *United States v. Cova*, 775 F.2d 595 (7th Cir. 1985), and its predecessors intact as the law of this circuit. Applying that test, I conclude that the district court erred in denying the

defendant's requested lesser included offense instruction on odometer tampering.

I.

It seems to me inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial, which will always permit the most complete assessment of what instructions the record will support. Nonetheless, the majority concludes that to do so would violate the text of Rule 31(c), which provides in relevant part that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ." The rule does not specifically mention instructions. Nevertheless, we know they are necessary to inform the jury of the existence and elements of appropriate offenses. None of the reasons advanced by the majority persuade me that a more constricted analysis of whether an instruction is supportable is necessary or even desirable simply because the proposed instruction presents the jury with an optional lesser charge. If the record fairly and rationally supports a tendered instruction, and if the instruction comports with the law on the subject and does not unfairly prejudice any party, we have no grounds for barring it.

To confine the determination of whether to give an instruction to an analysis of statutes is to impose an artificial restraint on the instruction formulation process. Nowhere is this artificiality more apparent than in *Cova*, the case that the majority herein overrules. In that case this court held that in light of the manner in which the government had proved its case, conspiracy to possess cocaine was a lesser included offense of conspiracy to distribute it. Conspiracy was a lesser included offense because the government offered proof that the defendant's method of supposed distribution included obtaining possession. 775 F.2d at 598. The majority of this *en banc* court concludes that *Cova*'s result could not be sustained under the element comparison test "[b]ecause it is possible for persons acquiring lawful possession to conspire to distribute," an

occurrence that is probably rare but, more significantly, is completely alien to the government's theory in *Cova*. *See supra* n.8. In plain terms, had the "elements" test been applied in *Cova*, the government would have lost a case that it had proved for a reason that had nothing to do with the case itself.

The test applied in *Cova* does not really change the question to be asked under Rule 31(c) in determining whether an instruction on a lesser offense should be given; rather, it simply expands the scope of the inquiry undertaken in answering that question. After all, it is the indictment that delimits the "offense charged" by the government in a particular case. The specific offense is further defined by the proof presented by the government at trial. Permitting consideration of the indictment and succeeding evidence, *in addition to* the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the "offense charged" in a given case, and of the lesser offenses necessarily subsumed therein. An assessment of what offenses the government has *proved* beyond those it charged can hardly be conducted without considering what the government's proof was.

The need for a complete method of determining what lesser offenses are included within a charged offense is particularly great where, as here, the statute at issue is one that can be violated in a number of ways. Indeed, the past several years have seen the enactment of a number of criminal statutes that can be violated in various ways, and that in fact are specifically predicated on violations of any number of other legal provisions. *See, e.g.*, 18 U.S.C. § 1963 (RICO); and 21 U.S.C. § 848 (Continuing Criminal Enterprise). The mail fraud statute at issue herein, 18 U.S.C. § 1341, also defines a violation in terms of other offensive conduct. It does not, however, attempt to limit the specific varieties of pertinent conduct in order to afford the government broad authority to battle particular fields of crime. These statutes are umbrella-like and, especially where RICO and the CCE statute are con-

cerned, carry extensive penalties. They are exactly the type of offenses for which consideration of lesser offenses is appropriate under Rule 31(c), but it is hard to imagine how any lesser included offense could ever be considered under the elements test, precisely because these "greater" offenses are so broadly defined. The lesser offense, because of its specific nature, will always contain elements not necessary for conviction under the broader statute. It is this exact concern that recently led a panel of the Tenth Circuit, in three separate opinions, to conclude that both the "elements" test and the "inherent relationship" test are valid, and that the use of each should be dictated by the nature of the individual case. *United States v. Cooper*, 812 F.2d 1283, 1285-86 (10th Cir. 1987); *id.* at 1287 (Baldock, J., concurring); *id.* at 1289 (McKay, J., concurring and dissenting).

The majority also decries the "inherent relationship" test because it necessarily results in the abandonment of the rule of "mutuality," which allows one party to request an instruction on a lesser included offense only if the other party also could have done so. This rule is inconsistent with a test for lesser included offenses that takes into account the evidence introduced at trial because the government is not permitted to alter the charges contained in the indictment when it submits them to the trier of fact if such alteration would prejudice the defendant, i.e. (as is relevant here) if the original indictment did not put the defendant on notice of the possibility of the alternate charge. *See generally Stirone v. United States*, 361 U.S. 212, 215-18 (1960); *United States v. Cina*, 699 F.2d 853, 857-58 (7th Cir. 1983). This latter rule, it should be noted, is the product of concerns for fairness at trial and the recognition of the role of an indictment in informing a defendant of the nature of the charges against him, as opposed to any specific concern for the relationship of the offenses to one another. The *Whitaker* court, in formulating the "inherent relationship" test, recognized that these principles of fairness would be violated if the government were permitted to submit an alternative charge

to the jury that, although supported by the trial record, was not sufficiently foreshadowed by the indictment. Accordingly, that court determined that the principle of mutuality should be "dispens[ed] with" so that the "inherent relationship" test could be applied. 447 F.2d at 320-22.

I agree with the *Whitaker* court's conclusion that the principle of mutuality is not necessary to the fair administration of justice and that it is properly discarded in favor of the "inherent relationship" test. In an ideal world, where all lawyers would be omniscient, *both* sides would be able to request instructions on lesser offenses based on the full trial record, which would have been anticipated before trial by omniscient defense counsel. In the real world, however, fairness requires that the prosecution be allowed to request only instructions that could fairly have been expected prior to trial. Defendants should be allowed to request instructions based on all the information available to them at the time of the request, including the trial record, thereby waiving any claim that *they* were not on notice. It may be, as the *Whitaker* court concluded, that this distinction gives no unfair advantage to defendants over prosecutors because prosecutors, who bear the burden of proof, will be able to assess the likely state of the record in advance and make their charging decisions accordingly. 447 F.2d at 321. Even if there is some advantage gained by defendants due to the abandonment of mutuality, that advantage is outweighed by the interests of justice that favor continued adherence to the "inherent relationship" test. This is hardly the only area of criminal trial law in which different rights accrue to the two respective sides.[1]

[1] The majority also opines that it "seems desirable" that the same test be used for determining whether a lesser offense instruction should be given and for determining whether cumulative punishment and/or separate trial is permissible on two charged offenses. *Supra* p. 13. I do not see why this identity is required. If a more expansive test is used for instruction purposes, the result will be that in some cases both instructions will be allowed where the

(Footnote continued on following page)

II.

I turn now to an evaluation of the instant case under the test originally formulated in *Whitaker* and refined by this court in *Cova* and several preceding cases, as well as in the panel opinion in this case. A comparison of the elements of the two crimes, mail fraud and odometer alteration, reveals (as the majority concludes) that the latter does not fall within the former as they are defined in the statute; proof of odometer alteration is not an element of mail fraud. In fact, no particular crime or unlawful conduct (or, for that matter, particular lawful conduct) is proscribed by the mail fraud statute with the exception of the act of mailing or causing matter to be mailed. This illustrates an earlier point, *i.e.* that statutes like the mail fraud provision, broadly drafted to encompass whole classes of illegal activity, will have few if any lesser included offenses under the elements test. Nevertheless it is clear to me that when the indictment and trial record are taken into account, the offense of odometer tampering should be considered a lesser included offense of mail fraud in this case.

In the instant case, the mailings that were the subject of the charges against the defendant were not separate

[1] *continued*
two offenses could be punished cumulatively or tried separately, i.e. where they are "separate" offenses under the elements test. I do not foresee any undesirable consequences flowing from this eventuality. If a defendant in such a case is acquitted on both charges he cannot be retried on either, not because of their relationship but because the acquittal itself acts as a bar. The same is true if the defendant is only convicted of the lesser offense; he could not be retried on the greater because his lesser conviction represents an implied acquittal on the greater charge. If he is convicted of the greater offense there is a *theoretical* possibility that the government could retry him on the lesser charge (because the jury never considered it), but this is highly unlikely. Of course, in a case such as the one I have just described the prosecution presumably would be free to charge both offenses initially and to seek consecutive sentences thereon.

from the fraudulent *acts* of which he was accused, but followed those acts both logically and chronologically. The mailings of the title applications by the defrauded car dealers, which the government claimed were caused by the defendant, were the direct result of the sales of altered cars. These sales were in turn the result of the odometer alterations that the defendant now asserts are lesser included offenses. As the government proved *this* case, it *had* to prove odometer tampering because tampering led to sale, which led to mailing. Had the charged mailings occurred before the tampering and/or in furtherance of the scheme (*e.g.* a letter from defendant to a confederate instructing him on tampering procedures or to a dealer proposing a fraudulent sale), it would not have been necessary to prove any fraudulent conduct beyond that of devising the scheme.[2] As is frequently the case, though, the government proved fraud in this instance by proving execution. In this case it *had to* prove execution because the charged mailings would not have occurred if the fraud had not been carried out. In this case, therefore, "proof of the lesser offense [was] necessarily presented as part of the showing of the commission of the greater offense." *Whitaker*, 447 F.2d at 319 (footnote omitted).

[2] In view of this analysis, the original panel opinion may have gone further than necessary in declaring generally that "there is an inherent relationship between mail fraud and the 'fraud' that underlies the mail fraud offenses." 776 F.2d at 1371. This may not always be the case, as the illustration in the text suggests. The analysis this court applied in *Coon* reflects, in my view, the correct use of information beyond the mere statutory elements by concentrating on the case as charged and tried, even though this may reflect some difference with the *Whitaker* court's formulation. There is really no need to discuss in the context of jury instructions how a prosecutor would "generally" charge or prove mail fraud when a black-and-white indictment and a real evidentiary record are available.

III.

The conclusion that odometer tampering should be considered as a lesser included offense of mail fraud in this case does not complete the inquiry necessary to determine whether an odometer tampering instruction should have been given. Even if a lesser offense is included in a greater offense (either under the majority's test or under the *Coon* test), a lesser offense instruction should not be given unless the evidence permits the jury "rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). *See also United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). As Judge Swygert pointed out in his original panel opinion, this requirement serves two functions: it prevents a defendant from using a lesser offense instruction simply as a device to allow him to ask for mercy from the jury, and it preserves the district judge's domain over questions of law and the jury's over questions of fact. 776 F.2d at 1371-72. In the present case the defendant presented at trial a rational basis upon which the jury could have found him guilty of odometer tampering but not guilty of mail fraud. The district court therefore erred in denying the defendant's request for the odometer tampering instruction.

At the close of the government's case, the defendant moved for a directed verdict of acquittal, basing his motion in part on *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), a case that concerned a nearly identical mail fraud scheme. In *Galloway* the defendant argued that his conviction under the mail fraud statute was precluded by the fact that the title documents mailed by the car dealers actually led to his capture, i.e. that they were counterproductive to rather than in furtherance of his fraudulent scheme. This court disagreed, concluding that the mailings were necessary to complete the retail sale of the automobiles and that they could not therefore be considered counterproductive to the scheme. 664 F.2d at 165, *distinguishing United States v. Maze*, 414 U.S. 395 (1974). In *Galloway*, how-

ever, the title applications that were contained in the unlawful mailings did not include odometer readings because none were required. This court noted that "[s]uch a requirement, of course, might have made detection of the scheme more likely." 664 F.2d at 165 n.7.

In his motion for a directed verdict, the defendant argued that the odometer readings in the title forms mailed in his case (the existence and inclusion of which were not disputed) made them counterproductive to his scheme as a matter of law. The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury.[3] It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction. The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the fraudulent car sale scheme. Because this rational possibility existed based on the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering.

The test adopted today by the majority for determining the propriety of lesser offense instructions has one virtue: it is the simpler of the two to apply. In the end, though, it disserves the purpose for which such instructions are allowed by separating the inquiry from its proper foundation. That the *Cova* test is more complex is not so much the result of its own inherent difficulty as of the necessary complexity of trials. Where jury instructions are concerned, accuracy has always been the goal, both in the law as

[3] Trial Transcript, p. 114. In his closing argument to the jury, defendant's counsel in fact argued that the mailings actually endangered the scheme to the point where they could not be considered "in furtherance." *Id.* at p. 173.

they state it and in the analysis of their support in trial records. I see no reason, either in Rule 31(c) or elsewhere, to turn to an antiseptic and unworldly formula, one which will, I believe, come to hinder both defense and prosecutorial efforts. Nowhere is this possibility made clearer than in *Cova*, the case that is overruled today. Accordingly I respectfully dissent from the affirmance of the defendant's conviction.

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Amendment: March 4, 1986

February 27, 1986.

Before

WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
JOEL M. FLAUM, Circuit Judge
FRANK H. EASTERBROOK, Circuit Judge
KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1317 vs.

WAYNE T. SCHMUCK,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83 CR 56
Barbara B. Crabb, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellee, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to grant a rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing en banc be, and the same is hereby, GRANTED.

IT IF FURTHER ORDERED that the judgment and opinion entered in this case on November 12, 1985 be, and are hereby, VACATED. This case will be reheard en banc at the convenience of the Court.

The parties are requested to file supplemental briefs on two questions:

1) Whether the inquiry into legislative intent that informs the decision to allow consecutive punishments, see Garrett v. United States, 105 S.Ct.

2407 (1985); United States v. Woodward, 105 S.Ct. 611 (1985); Albernaz v. United States, 450 U.S. 333 (1981); should be used to determine whether one offense is a lesser included or necessarily included offense of another for purposes of Fed. R. Crim. P. 31(c), and if adopted, whether this inquiry has implications to our holding in United States v. Cova, 755 F.2d 595 (7th Cir. 1985).

2) Whether, if this inquiry is employed, odometer tampering (in violation of 15 U.S.C. 1984) is a necessarily included offense of mail fraud (in violation of 18 U.S.C. 1341).

The supplemental briefs shall be filed simultaneously on or before March 19, 1986.

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 12, 19 85.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1317 vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 83 CR 56
Judge Barbara B. Crabb

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

XXVII

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1317

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WAYNE T. SCHMUCK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 CR 56—Barbara B. Crabb, *Judge.*

ARGUED SEPTEMBER 13, 1984—DECIDED NOVEMBER 12, 1985

Before FLAUM, *Circuit Judge*, and SWYGERT and FAIRCHILD, *Senior Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* Defendant Wayne T. Schmuck appeals from his conviction of twelve counts of mail fraud, 18 U.S.C. § 1341 (1982). Because the defendant was improperly denied an instruction on a lesser included offense, we reverse and remand for a new trial.

The defendant concedes that he willfully rolled back odometers in order to sell used cars for inflated prices, a federal misdemeanor. 15 U.S.C. §§ 1984, 1990c(a) (1982). Nevertheless, he was indicted of mail fraud only, a felony, and the district court denied his request that the jury be instructed on the odometer tampering offense as a lesser included offense of mail fraud.

XXVIII

The mail fraud statute requires a scheme to defraud and some mailing in furtherance of that scheme. According to the indictment and evidence at trial, the underlying scheme to defraud was the defendant's admitted odometer tampering. As for the mailing requirement, it is undisputed that the defendant did not personally use the mails to further his scheme. Rather, the unwitting retailers to whom the defendant sold the cars mailed forms, pursuant to the prevailing practice in Wisconsin, to the Secretary of State that included, *inter alia*, the defendant's fraudulent odometer readings. These forms were necessary to obtain a certificate of title. Without such a certificate, the cars were not marketable to the ultimate consumers.

I

The defendant urges outright reversal of his convictions on two grounds that can be dismissed summarily. First, he argues that no rational trier of fact could find that he used the mails in furtherance of his odometer-tampering fraud. In *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), we held that a rational trier of fact could convict on a mail fraud charge arising from a virtually identical odometer tampering scheme that also entailed the same mailings of forms by third-party retailers. We refuse to overrule that decision.

Second, defendant contends that due process prohibits a mail fraud conviction based on a routine mailing by a third party that the defendant has no power to prevent. One answer is that he can prevent the mailing by abstaining from the fraud. In any event, this court in *Galloway*, 664 F.2d at 161, perceived no due process impediment to holding the same type of mailing a predicate for a mail fraud conviction. Nor did the Supreme Court when it said that a person causes the mails to be used if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen" even though

use of the mails was not actually intended. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

Defendant argues that his convictions violated due process in still another respect because the mail fraud statute does not give fair warning that a fraud which causes a mailing in the manner present here is a violation of the statute. Regardless of what the defendant or any reasonable person might conclude upon reading the mail fraud statute in isolation, the expansive judicial interpretations of the language, going back many years, must be considered with the text, and leave no doubt that a fraud that foreseeably causes a mailing under the present circumstances is an offense.

II

The defendant also urges several grounds for a reversal and remand for a new trial. We need only reach the lesser included offense issue.

Defendant moved in advance of trial for an instruction that would have permitted the jury to find him guilty of odometer tampering. He was entitled to such an instruction if, under these facts, odometer tampering can properly be considered a lesser included offense of mail fraud and if a rational juror could have found him innocent of mail fraud but guilty of odometer tampering. *See* Fed.R.Crim.P. 31(c); *Keeble v. United States*, 412 U.S. 205, 208 (1973).

We find that under these facts odometer tampering is a lesser included offense of mail fraud. It is possible, of course, to commit mail fraud without altering odometers. Apart from the mailing element, the mail fraud statute requires only some "scheme" to defraud. 18 U.S.C. § 1341. The scheme need not concern odometers, and even if it does, it need not be completed. The offense of odometer tampering, on the other hand, is necessarily concerned with odometers, and the tampering must be completed to be punishable under 15 U.S.C. §§ 1984, 1990c(a). This

theoretical possibility of committing the greater offense without committing the lesser offense would be dispositive under the traditional definition of a lesser included offense; the lesser offense would lack the requisite identity of statutory elements with the greater offense. Two circuits continue to follow this traditional definition. *See United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3d Cir. 1977).

This circuit, however, does not follow the traditional definition. Rather than focus on theoretical possibilities, we look to the facts as alleged in the indictment and as proven at trial to determine whether the prosecution relied on proof of all the elements of the lesser offense to prove, in turn, guilt of the greater offense. *See United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *accord United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir. 1983); *United States v. Johnson*, 637 F.2d 1224, 1238-39 (9th Cir. 1980); *United States v. Whitaker*, 447 F.2d 314, 319 (D.C. Cir. 1971). Thus, it is beside the point that a scheme to defraud *could* have been sufficiently established without proof of all the statutory elements of odometer tampering. What matters is that according to the prosecution's theory of the case, as expressed in the indictment and at trial, the defendant did intentionally cause odometers to be rolled back,[1] thereby satisfying all the elements of the odometer tampering statute.

[1] The prosecution argues that odometer tampering requires a greater degree of specific intent than does mail fraud because the former offense contains the additional element of "wilfulness." This court has recently held that the mental state required by 15 U.S.C. § 1990c is simply intent to commit the prohibited act; the "knowingly and wilfully" language "means exactly what it says rather than contain[s] a hidden requirement." *United States v. Ellis*, 739 F.2d 1250 (7th Cir. 1984). Thus, to be convicted of odometer tampering, the defendant need only intend to roll back odometers. Indeed, because it is not even necessary to show an additional intent to defraud others thereby, the odometer tampering statute actually requires a lesser showing of intent than does the mail fraud statute. *See id.*

XXXI

To be sure, this more flexible definition of a lesser included offense carries with it the potential for abuse. The defendant might confuse the jury by securing instructions on a myriad of crimes only tangentially related to the one charged; as a result, the jury may feel pressured to return a compromise verdict even though it would otherwise be inclined to convict the defendant of the greater offense charged. We therefore join the District of Columbia Circuit in requiring the defendant, when requesting a lesser included instruction, to show some "inherent relationship" between the lesser offense proved and the greater offense charged. *See Whitaker*, 447 F.2d at 319.

An "inherent relationship" exists where the two offenses relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense. *Id.* If such is the case, there is little chance that the jury will be confused by the lesser included instruction. Rather, the instruction will alert the jury to its duty to decide not simply whether the defendant is guilty, but what he is guilty of. Where there is such an inherent relationship, the two offenses can properly be viewed as simply two different degrees of the same general crime, and the instruction informs the jury that different degrees of culpability can be ascribed to the defendant's wrongful conduct.

We hold that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. Both offenses protect against the same kind of societal wrong: fraud. And it can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. *See supra* at 3-4; *cf. Whitaker*, 447 F.2d at 319 (generally, though not invariably, proofs must overlap). Moreover, it is difficult to see how an instruction on the underlying fraud will confuse the jury. Congress has deemed fraud that is perpetrated through the mails to be an especially serious offense, punishable as a felony by as much as five years in jail for each mailing. But a

XXXII

misdemeanor fraud, such as odometer tampering, is deemed less threatening to society and carries a lesser penalty. An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

Having found odometer tampering to be a lesser included offense of mail fraud, we turn to the second requirement that must be satisfied in order to be entitled to an instruction on the lesser offense: that a rational trier of fact could have found the defendant innocent of the greater offense, but guilty of the lesser offense. *See Keeble*, 412 U.S. at 208; *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). The reason for this requirement is to ensure that the instruction is not "merely a device for defendant to invoke the mercy-dispensing prerogative of the jury."[2] *United States v. Sinclair*, 444 F.2d 888, 890 (D.C. Cir. 1971); *accord Medina*, 755 F.2d at 1273; *United States v. Busic*, 592 F.2d 13, 24-25 (3d Cir. 1978). And in a larger sense, this requirement prevents the judge and jury from encroaching on the other's domain. The jury resolves factual issues only; the judge decides the law. To be sure, the jury's decision to convict on the lesser rather than the greater offense should and does indirectly affect the defendant's ultimate punishment, an issue of law. But the jury makes such a

[2] On the other hand, we do not presume to eliminate jury equity; a judge cannot direct a verdict of guilty no matter how strong the evidence. It is proper, however, for the judge to discourage verdicts that disregard—whether intentionally or not—the evidence. As Judge Leventhal pointed out in *Sinclair*, 444 F.2d at 890:

> While a judge cannot eliminate the prerogative a jury retains to disregard his instruction and to acquit on the basis of conjecture rather than reason, the judge is not required to put the case to the jury on a basis that essentially indulges and even encourages speculations as to bizarre reconstructions [of the evidence].

decision only because it finds a factual element of the greater offense lacking; it cannot invade the province of the judge by deciding as a matter of law that, regardless of the facts, conviction of the lesser offense and the attendant lesser punishment are more appropriate.[3] On the other hand, in deciding what a rational juror can and cannot conclude from the evidence, the court should be wary of invading the exclusive factfinding prerogatives of the jury.

As the literal terms of the test indicate, the courts will rarely deem a potential jury finding "irrational." This is in keeping with the policies that underlie the test: the object is merely to discourage the jury from rendering mercy verdicts without invading the jury's province as the ultimate finder of fact. In general, the courts will find irrationality only where the theory of the defense is logically inconsistent with a guilty verdict on the lesser offense or where evidence of such guilt is so slight as not to raise a jury question on the issue. In the first instance, the danger of encouraging jury misconduct is obvious. An illogical verdict is by definition irrational and is probably motivated by factors extrinsic to the evidence at trial—i.e., a desire to render a mercy verdict. Thus, if a defendant in a murder prosecution relies on an alibi defense, he can hardly ask the jury, in the alternative, to convict him of a lesser degree of homicide. Either he is guilty of murder or completely innocent; any other verdict would be an illogical compromise verdict. In such a case, the defendant is not entitled to a lesser included instruction. *E.g., Briley v. Bass*, 742 F.2d 155, 164-65 (4th Cir. 1984).

In the second instance, the courts will refuse to give the lesser instruction not because a verdict of guilty would be illogical or wholly unsupported by the evidence, but because the evidence to sustain the verdict is simply too thin to persuade a rational juror. *See, e.g., Medina*, 755 F.2d at 1273 n.2; *Busic*, 592 F.2d at 24-25; *Sinclair*, 444

[3] *But see supra* note 2.

F.2d at 890. Yet if a rational juror should be expected to return verdicts that are plausible as well as merely logical or merely supported by some scintilla of evidence in the record, courts must take care to allow jurors to choose from a broad range of plausible verdicts. Thus, the courts draw all inferences in favor of finding the potential verdict rational. *See Sinclair*, 444 F.2d at 890. Where the verdict would require a bizarre or overly imaginative reconstruction of events, the verdict is irrational. *See id.* The classic example is where a defendant is found in possession of more than a ton of marijuana and is charged with possession with intent to distribute. Although it is possible that the defendant had no intent to distribute, such a possibility is so improbable that an instruction on the lesser offense of simple possession is improper. *E.g., United States v. Silla*, 555 F.2d 703, 706-07 (9th Cir. 1977).

Turning to the case at bar, an acquittal of mail fraud would have been logically consistent with a conviction of odometer tampering. Such a verdict would follow from a finding that the mailings were not sufficiently in furtherance of the underlying fraud to justify a mail fraud conviction.

As for the requirement that the verdict be rational and plausible as well as logical, such a conclusion of the mailings issue would have been substantially supported by the record evidence. This is not a case where the defendant presented little or no evidence on point. *Cf. Busic*, 592 F.2d at 25 (it is not enough that the defendant formally contested the existence of the additional element distinguishing the greater offense from the lesser; "[t]he contest must be real"). Indeed, the defendant rested his entire defense on the theory that the mailings element was lacking. The jury could have rationally and plausibly concluded that mailings by third-party retailers who were not under the control of the defendant did not sufficiently further the fraud to justify a conviction. True, the mailing of fraudulent odometer readings allowed the unwitting retailers to gain the certificate of title necessary to market the cars, which in turn encouraged them to con-

tinue to do business with the defendant. Yet the jury could have plausibly concluded that, on balance, the mailings were counterproductive to the fraud because they brought the fraudulent odometer readings to the attention of the authorities.

Alternatively, the jury could simply conclude that, aside from the counterproductive effect of the mailings, the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme. Although the mailings here may have "furthered" the scheme in the literal sense of the word, it is clear that the statute requires something more. For in the modern economy, it is difficult to imagine a transaction that does not at some point involve some tangential use of the mails by some party at least remotely related to the defendant. Lest all fraud be subsumed by the mail fraud statute, the courts require that the mailings further the fraud in the sense that it is at least incidental to an essential element of the fraud. *United States v. Lea*, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980).

Whether the retailers' ability to secure title was essential to the defendant's scheme and whether the mailings of odometer readings to obtain such title were incidental to that end are questions for the jury. These are issues that involve difficult line-drawing problems; this is not a case where a conviction on the lesser offense would require bizarre or overly-imaginative inferences from the evidence. *See Silla*, 555 F.2d at 706-07; *Sinclair*, 444 F.2d at 890.

It is true that in *Galloway*, 664 F.2d at 161, we stressed that a jury could rationally convict on virtually identical facts. But we did not hold the opposite verdict to be irrational; we simply pointed out that the mailings issue was one for the jury to decide. Consistent with *Galloway*, we now hold that the jury could have rationally reached either verdict. Mailings by third parties not under the control of the defendant that indirectly, if at all, further the underlying fraud may or may not be sufficiently "in furtherance" of the fraud to justify a mail fraud conviction;

the issue is one of fact, and the two opposite conclusions are both sufficiently plausible to be within the purview of the jury's rational discretion.

III

Because the defendant was entitled to an instruction on odometer tampering, we reverse his convictions and remand for a new trial. Circuit Rule 18 shall not apply.

FAIRCHILD, *Senior Circuit Judge*, concurring in part, dissenting in part.

I concur in Part I, but respectfully dissent from Parts II and III. Even if we assume the adherence of this Circuit to the doctrine of *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), relaxing the traditional concept of a lesser included offense, I do not find an inherent relationship between odometer alteration and mail fraud.

The elements of mail fraud, 18 U.S.C. § 1341, relevant to this case are (1) having devised a scheme to defraud and (2) knowingly causing mail delivery of matter for the purpose of executing the scheme. No particular fraudulent act need have been accomplished, although as in the present case, the devising of the scheme is very commonly proved by showing particular instances of fraudulent conduct and inferring the scheme from the conduct. Such conduct may be criminal under state or federal law but need not be. In the present case it happens to be a federal offense. Defendant's devising a scheme to defraud was established by proof that he had caused odometers to be altered on many automobiles he had acquired and later sold including those to which the twelve mailings related. Under the traditional test of comparing statutory elements, knowing and willful alteration of an odometer is not an element necessarily included in mail fraud.

Moreover, one cannot spell out of the present indictment a charge that defendant knowingly and willfully caused the alteration of the odometer on any particular automobile. Any implication to that effect arises from the fact that each count alleges the mailing, by a dealer, of an application for title for a specified automobile, and charges that defendant caused each mailing for the purpose of executing the scheme.

At trial, in order to prove the creation of the scheme and the relationship of each mailing, the Government proved that the odometer on the particular vehicle was one of those which defendant had caused to be altered. It is this evidence which affords the basis for defendant's claim that the jury should have been told that on each count it could convict him of odometer alteration if not convinced that the mailings furthered the scheme.

The leading case relaxing the traditional test for a lesser included offense is *United States v. Whitaker*, 447 F.2d 314. That opinion, at page 319, states the rule as follows:

> A more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. This latter stipulation is prudently required to foreclose a tendency which might otherwise develop towards misuse by the defense of such rule. In the absence of such restraint defense counsel might be tempted to press the jury for leniency by requesting lesser included offense instructions on every lesser

crime that could arguably be made out from any evidence that happened to be introduced at trial.

(Footnote omitted.) The part of the *Whitaker* test which is so clearly lacking in the present case is that the two offenses "must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."

I think that no such close relationship exists between the offenses of odometer alteration and mail fraud.

In *Whitaker*, itself, the offense charged was burglary and the court found that unlawful entry was an included offense where proved even though burglary could occur after an authorized entry.

In *United States v. Pino*, 606 F.2d 908 (10th Cir. 1979), the offense charged was involuntary manslaughter while driving a motor vehicle in an unlawful manner without due caution and the court held that careless operation of a vehicle was an included offense where proved.

In *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980), the offense charged was assault resulting in serious bodily injury and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Stolarz*, 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977), the offense charged was assault with intent to commit murder and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), the offense charged was conspiracy to distribute cocaine and this court held that conspiracy to possess cocaine was an included offense.

The facts of all these cases demonstrate a much closer relationship between the offense not charged but proved in the course of trial and the offense charged than can

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be discerned between odometer alteration and mail fraud. It seems fair to say that in each case the offense found to be lesser included comes within a hair's breadth of fulfilling the traditional test of comparing statutory elements.

In *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1983), the Tenth Circuit held that there was no inherent relationship between the offense incidentally proved and the offense charged. The defendant had sought a lesser included offense instruction as to violation of EPA Certification Regulations. The charged offenses were conspiracy, mail fraud and racketeering.

There is apparently no case holding that fraudulent conduct which happens to constitute a federal offense and is proved in establishing the elements of mail fraud is included within mail fraud. Indeed, I would suppose that if properly charged, a defendant could be convicted of both odometer alteration and mail fraud and the punishments could be cumulative.

Going on to another point, even if the lesser offense is included in the greater, the evidence must "permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" before defendant is entitled to an instruction on the point. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *United States v. Busic*, 592 F.2d 13, 24-25 (2nd Cir. 1978). With all respect, I do not believe that the evidence and concessions made by defendant in this case leave open any issue of fact as to mailings furthering the scheme. The scheme proved was clearly an ongoing course of business. There was proof that defendant admitted altering odometers on a great many cars over a substantial period of time. In the proof of the twelve counts it was shown that one dealer who bought from defendant made four successive purchases and mailed applications for each of them in order to obtain titles in the names of his customers. Another dealer made five successive purchases and similar mailings.

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Beyond any doubt, the mailings not only furthered, but were essential to the continued success of the scheme.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 6004—Midwest Law Printing Co., Inc., Chicago—11-12-85—150

XLI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,	INDICTMENT
vs.	
WAYNE T. SCHMUCK,	18 U.S.C. [illegible]
Defendant.	

THE GRAND JURY CHARGES:

COUNTS ONE
THROUGH THIRTEEN

1. At all times pertinent to this indictment, WAYNE T. SCHMUCK did business in the name of Big Foot Auto Sales, located in Harvard, Illinois.

2. From on or about July 1, 1979 and continuing until on or about July 30, 1980, the defendant,

WAYNE T. SCHMUCK

did devise and intend to devise a scheme to defraud persons in the State of Wisconsin (hereinafter referred to as "Wisconsin customers"), who would be and were induced to purchase automobiles from Wisconsin automobile dealers (hereinafter referred to as "Wisconsin dealers"), on which WAYNE T SCHMUCK had caused the odometer mileage readings to be altered so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile.

3. It was a part of this scheme that WAYNE T. SCHMUCK would and did in the course of his business purchase used automobiles from individuals and auto

XL.II

auctions in Illinois, Wisconsin, and elsewhere, for resale to various persons, including automobile dealers in Wisconsin.

4. It was further a part of the scheme that WAYNE T. SCHMUCK would cause the odometer mileage reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile.

5. It was further a part of the scheme that WAYNE T. SCHMUCK would and did prepare an odometer mileage statement for each of the automobiles referred to in paragraph 4 on which was entered the odometer mileage reading as WAYNE T. SCHMUCK had caused it to be altered.

6. It was further a part of the scheme that WAYNE T. SCHMUCK would offer these automobiles to purchasers at the used car lot of Big Foot Autos in Harvard, Illinois, including autombile dealers from the State of Wisconsin.

7. It was further a part of the scheme that Wisconsin dealers purchasing each automobile would and did pay WAYNE T. SCHMUCK for the automobile and that WAYNE T. SCHMUCK would and did provide each Wisconsin dealer with an original odometer mileage statement reflecting the mileage as WAYNE T. SCHMUCK had caused it to be altered.

8. It was further a part of the scheme that the Wisconsin dealers would offer these automobile in Wisconsin for sale to Wisconsin customers (or, in some instances, to other Wisconsin dealers) and that the Wisconsin dealers would and did prepare an odometer mileage statement for each of the automobiles on which was entered the mileage as it appeared on the automobile odometer, which,

because WAYNE T. SCHMUCK had caused it to be altered, did not reflect the true and correct mileage for that automobile.

9. It was further a part of the scheme that in purchasing each of these automobiles, the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage reading as it appeared on the automobile odometer and on the odometer mileage statements provided by WAYNE T. SCHMUCK and further that the Wisconsin dealers and Wisconsin customers would and did pay more for each automobile than would have been paid if the odometer mileage reading had not been altered.

10. It was further a part of the scheme that each Wisconsin dealer who purchased an automobile from WAYNE T. SCHMUCK would and did submit a Wisconsin title application form to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, in order to obtain a Wisconsin title in the name of the Wisconsin dealer or on behalf of and in the name of the Wisconsin customer.

11. On or about the dates set forth below, in the Western District of Wisconsin, the defendant,

WAYNE B. SCHMUCK,

for the purpose of executing this scheme, did cause to be delivered by mail according to the direction thereon, mail matter to be sent and delivered by the United States Postal Service, to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, 4802 Sheboygan Avenue, Madison, Wisconsin, from the Wisconsin dealer indicated, containing in each instance a Wisconsin title application form pertaining to a particular automobile described below:

Received
Transferred

COUNT	APPROXIMATE DATE OF MAILING	WISCONSIN DEALER	AUTOMOBILE DESCRIPTION AND SERIAL NUMBER
1.	July 25, 1979	Cameron Auto Sales 7-19 Returned 7-21 Transferred Cameron, Wisconsin	1973 Chevrolet 1Y17K3W156990
2.	September 26, 1979	Southside Auto 6-80 Cameron, Wisconsin 9-10	1977 Chevrolet CCL447J129679
3.	November 8, 1979	P and A Sales 11-7-79 Bloomer, Wisconsin 8-10	1977 Mercury 7274A602435
4.	February 18, 1980	Southside Auto 2-20-80 Cameron, Wisconsikn	1977 Chevrolet CKR247F325035
5.	February 27, 1980	Grass Motor Sales 2-29-80 Bloomington, Wisconsin	1977 Buick 4V69K7H514944
6.	March 21, 1980	P and A Sales 3-17-80 Bloomer, Wisconsin	1978 Ford 8P63H127461
7.	March 31, 1980	P and A Sales 3-27-80 Bloomer, Wisconsin	1973 Chevrolet CCY243J126096
8.	May 27, 1980	P and A Sales 5-17-80 Bloomer, Wisconsin	1975 Ford F10GLW04097
9.	May 5, 1980	P and A Sales 5-5-80 Bloomer, Wisconsin	1975 Ford 5G21H139390
10.	June 9, 1980 6-24-80 6-27-80	Hi Way Service Garage Marshfield, Wisconsin	1975 Ford 5X11Y215161
11.	June 27, 1980	Southside Auto 5-4-80 Cameron Wisconsin 6-23-80	1977 Dodge NH45C7B100810
12.	July 2, 1980	Southside Auto 6-30-80 Cameron, Wisconsin 6-4-80	1977 Dodge NL41C7F292674

(All in violation of Title 18, United States Code, Sections 1341 and 2.)

A TRUE BILL

FOREMAN

JOHN R. BYRNES, United States Attorney

Indictment returned: 11-1-83

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CLERK'S OFFICE 83-CR-56-C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE T. SCHMUCK,

Defendant.

ORDER
83-CR-56-C

- -

Defendant has moved to dismiss the indictment against him on the ground that it fails to allege facts which would support a conviction under 18 U.S.C. §1341.[1/]

Defendant contends that the indictment is deficient in failing to set out specifically that the mailings which were alleged to be in furtherance of defendant's scheme did not endanger the success of defendant's scheme. Defendant argues that such an allegation is necessary in view of the holding of the United States Supreme Court in United States v. Maze, 414 U.S. 395 (1973), to the effect that mailings which actually enhance the probability of detection are not within the purview of the statute.

Defendant is correct in his understanding that a conviction could not stand if it were based upon mailings that did not actually "further" the scheme to defraud. However, that is a matter to be determined at trial. The indictment is sufficient if it merely alleges that the mailings were caused by the defendant for the purpose of executing the scheme. The indictment in this case includes the

1/ Defendant has also moved to dismiss on the ground that the indictment fails to charge an offense under 18 U.S.C. §1342. Since the indictment does not purport to charge an offense under this section but, rather, under §§1341 and 2, I have not considered defendant's arguments in this regard.

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Copy of this document has been mailed this 14 day of Nov, 1983
By Deputy Clerk

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requisite allegations.

ORDER

Defendant's motion to dismiss the indictment against him is DENIED.

Entered this 11th day of November, 1983.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE T. SCHMUCK,

Defendant.

FINAL PRETRIAL CONFERENCE ORDER
83-CR-56-C

- -

A final pretrial conference was held in this case on December 15, 1983, before United States District Judge Barbara B. Crabb. Plaintiff appeared by John Vaudreuil. Defendant appeared in person and by counsel, Harry Saltzburg. Also present was Peter Steinberg.

Counsel agreed to the voir dire questions in the form given to counsel at the conference.

Defendant's motion for the giving of an instruction on a lesser included offense was denied. Defendant's motion to let the jury decide whether the mailings in this case further the offense was granted. Defendant's motion to give his requested theory of defense instruction was denied on the ground that the proposed instruction did not incorporate a theory of defense.

Defendant noted that he opposed the government's request for the giving of an instruction on either joint venture or aiding and abetting and that he opposed the giving of an instruction on disagreement among jurors. A decision on the giving of an instruction either on joint venture or aiding and abetting was

reserved until the close of evidence in the trial. The defendant's objection to the giving of the instruction on disagreement among jurors was overruled.

Entered this 16th day of December, 1983.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

XLIX

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE SCHMUCK,

Defendant.

ORDER
83-CR-56

- -

Defendant has moved for a judgment of acquittal or, in the alternative, for a new trial. In support of the motion defendant contends that it was error to fail to instruct the jury on the lesser-included offense of odometer tampering and to allow in evidence of odometer tampering on cars other than those charged in the indictment. Also defendant contends that in prosecuting this case as a mail fraud which is a felony rather than as odometer tampering which is a misdemeanor, the United States Attorney has usurped the function of Congress.

For the reasons stated on the record during the course of the trial and in the pretrial proceedings, I find no merit in the first two grounds raised by defendant. The third ground, raised here for the first time, is unpersuasive. The Court of Appeals for the Seventh Circuit has upheld convictions for mail fraud on the same set of facts, see United States v. Galloway, 664 F.2d 161 (7th Cir. 1981). Moreover, there is nothing in the mail fraud statute that prevents a prosecutor from using it against persons who benefit from the use of the mails to further their odometer tampering schemes. The fact that Congress has made the act of odometer tampering a federal crime does not mean that Congress did not believe the use of the mails to carry out a whole scheme to defraud by odometer tampering cannot also be a federal crime. The focus in the

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first instance is upon the tampering itself; in the second instance, it is upon the criminal use of the mails.

ORDER

IT IS ORDERED that defendant's motion for acquittal or, in the alternative, for a new trial, is DENIED.

Entered this 29th day of December, 1983.

BY THE COURT:

Barbara B Crabb

BARBARA B. CRABB
District Judge

Li

United States of America vs

DEFENDANT: WAYNE T. SCHMICK

United States District Court

THE WESTERN DISTRICT OF WISCONSIN

DOCKET NO. 83-CR-56-C

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL: In the presence of the attorney for the government, the defendant appeared in person on this date February 24 19

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X WITH COUNSEL Harry Salzberg
(Name of Counsel)

PLEA: ___ GUILTY, and the court being satisfied that there is a factual basis for the plea ___ NOLO CONTENDERE X NOT GUILTY

FINDING & JUDGMENT: There being a XXXXX verdict of ___ NOT GUILTY. Defendant is discharged
X GUILTY.

Defendant has been convicted as charged of the offense(s) of **frauds and swindles, in violation of Title 18, U.S.C. §1341, and fictitious name or address, U.S. Postal Service, in violation of Title 18, U.S.C. §1342.**

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 90 days on Count I. It is recommended that work release privileges not be granted during the period of confinement.

As to each of Counts II through XII, it is adjudged that the defendant pay a fine to the United States of $50 and the imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of four (4) years, under the terms and conditions of the court set forth in Appendix A, attached hereto; said probation on each count to run concurrently; said period of probation to commence upon release from physical custody on Count I of the Indictment. The fines are to be paid within six (6) months of the termination of the probation period.

SPECIAL CONDITIONS OF PROBATION: It is ordered that execution of the sentence is stayed pending the outcome of the appeal in this case. The present conditions of release are continued pending appeal

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant, revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends.

A TRUE COPY. Certified this 27 day of Feb, 19 84.

Joseph W. Skupniewitz, Clerk
By _____
Deputy Clerk

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge
___ U.S. Magistrate

Barbara B Crabb

February 24, 1984

APPENDIX A TO JUDGMENT AND PROBATION/COMMITMENT ORDER

The defendant is placed on probation for a period of Four (4) year upon the following terms and conditions:

(1) Defendant shall refrain from violation of any law (federal, state, and local), and shall get in touch immediately with defendant's Probation Officer if arrested or questioned by a law enforcement officer.

(2) Defendant shall associate only with law-abiding persons and maintain reasonable hours.

(3) Defendant shall work regularly at a lawful occupation and support defendant's legal dependents, if any, to the best of defendant's ability. When out of work defendant shall notify defendant's probation officer at once. Defendant shall consult defendant's probation officer prior to job changes.

(4) Defendant shall not leave the judicial district without permission of the probation officer.

(5) Defendant shall notify defendant's probation officer immediately of any change in place of residence.

(6) Defendant shall follow the probation officer's instructions and advice.

(7) Defendant shall report to the probation officer as directed.

(8) If the offense of which defendant has been convicted in this case is punishable by imprisonment for a term exceeding one year, or if the defendant has ever been convicted in any federal court or in any court of any state or in any court of any political subdivision of any state of an offense punishable by imprisonment for a term exceeding one year, then the defendant shall not receive, possess, or transport in commerce or affecting commerce any firearm, as defined in 18 U.S.C. §921(a)(3), including any hand gun, rifle, or shotgun.

4.111

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Petitioner Wayne T. Schmuck, by and through his Counsel, Peter L. Steinberg, and respectfully prays this Honorable Court for the entry of an order granting Petitioner leave to proceed in forma pauperis in the above entitled petition for writ of certiorari, and appointing his present counsel to appear on his behalf in the event that his petition is granted, pursuant to Rule 46 of the Supreme Court Rules, 28 U.S.C. § 1915, and 18 U.S.C. § 3006A.

As grounds for this motion petitioner shows the following:

1. He was previously granted leave to proceed on appeal by the District Court in this case, and counsel was appointed to represent him, as shown by the attached Order of March 9, 1984, which is incorporated herein by reference,

2. He desires review of the decision of the Court of Appeals in his case, but due to his poverty is unable to pay the necessary costs and expenses of the present writ.

This motion is made in good faith and not for purposes of delay.

Dated: February 11, 1988.

Respectfully submitted,

Peter L. Steinberg

Peter L. Steinberg
Counsel for Wayne T. Schmuck
6 Bigelow Street
Cambridge, Mass. 02139
Tel. (617) 547-8557

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

ORDER
83-CR-56-C

v.

WAYNE T. SCHMUCK,

Defendant.

- -

Defendant has moved for leave to proceed on appeal in forma pauperis, for appointment of counsel to represent him on appeal, for preparation of the transcript of the proceedings at government expense, and for release of the order of this court requiring him to pay $1000 toward the cost of his trial representation in monthly installments of $100.

Leave to proceed on appeal in forma pauperis is GRANTED.

It is not necessary to order appointment of Harry E. Salzberg as counsel in this case as Mr. Salzberg was appointed to represent defendant in the criminal proceedings in this case and he is counsel of record for defendant unless and until he is relieved of that representation by the Court of Appeals for the Seventh Circuit.

In a separate order I have directed preparation of a transcript of the proceedings in this case at government expense.

With respect to defendant's release from the order of this court requiring him to make payments toward the cost of his trial representation, I am satisfied from a review of the presentence report in this case that defendant is without the financial resources to comply with that order. Defendant's ability to pay has been substantially changed by the loss of his job following his conviction in

this case on December 20, 1983. Therefore, IT IS ORDERED that the order of the magistrate dated September 14, 1983, and modified September 22, 1983, is vacated with respect to the provision that defendant pay $1000 toward the cost of his trial representation in monthly installments of $100.

Entered this 9th day of March, 1984.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ENTRY OF APPEARANCE

Please take notice that the undersigned Peter Lewis Steinberg, being a Member of the Bar of this High Court, admitted January 19, 1981, hereby enters his appearance in the above entitled matter on behalf of, and at the request of, Petitioner Wayne T. Schmuck. The undersigned previously appeared as co-counsel for petitioner at trial before the District Court and before the United States Court of Appeals, and presented both oral arguments on petitioner's behalf.

Dated: February 11, 1988.

Respectfully submitted,

Peter L. Steinberg
Counsel of Record for
Petitioner Wayne T. Schmuck
6 Bigelow Street
Cambridge, Mass. 03129

Tel. (617) 547-8557

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE.

I, Peter L. Steinberg, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court, that the attached Entry of Appearance, Motion For Leave To Proceed In Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit were duly served upon the following persons by depositing a single copy thereof with the United States Post Office in Cambridge, Massachusetts, first class postage prepaid, addressed to:

John R. Byrnes
United States Attorney, Western District of Wisconsin
John W. Vaudreuil
Assistant United States Attorney
U.S. Court House, Room 420
120 N. Henry Street
Madison, Wisconsin 53703

and

Solicitor General,
Department of Justice
Washington, D.C. 20530

this 11th day of February, 1988.

I further certify that all parties required to be served

have been served, and their names and addresses are listed above, and that I am a member of the Bar of this Honorable Court, and my entry of appearance in the present case is attached hereto.

Dated: February 11, 1988

Respectfully submitted,

Peter L. Steinberg

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ORIGINAL

No. 87-6431

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE T. SCHMUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

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QUESTIONS PRESENTED

Petitioner was charged under 18 U.S.C. 1341 with committing mail fraud by devising a scheme to sell automobiles after he had reduced the mileage readings on their odometers and causing mailings in furtherance of that scheme. The district court refused to instruct the jury that it could convict petitioner of odometer tampering, a misdemeanor under 15 U.S.C. 1990c. The questions presented are:

1. Whether petitioner was entitled to a jury instruction on odometer tampering because the proof at trial showed that he committed that crime and because that crime is inherently related to the crime with which he was charged, even though not all the elements of odometer tampering are elements of mail fraud.

2. Whether the mailings caused by petitioner's scheme to defraud were sufficiently connected to and in furtherance of that scheme to support petitioner's conviction of mail fraud.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. iii-xxiv) is reported at 840 F.2d 384. The original panel opinion (Pet. App. xxvii-xli) is reported at 776 F.2d 1368.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 21, 1988. The petition for a writ of certiorari was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on 12 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 90 days' imprisonment on Count 1 and he was placed on four years' probation on each of Counts 2 through 12. A panel of the court of appeals reversed petitioner's conviction (Pet. App. xxviii-xli). The panel decision was subsequently vacated

(id. at xxv), and on rehearing en banc petitioner's conviction was affirmed (id. at iii-xxiv).

1. The evidence at trial, the substance of which is not in dispute, showed that petitioner engaged in a scheme to defraud purchasers of used automobiles by substantially reducing the mileage readings on the automobiles' odometers. Petitioner "would purchase automobiles, cause their odometer readings to be altered, offer them to dealers, and provide purchasing dealers with an odometer statement reflecting the false mileage." Pet. App. iv. The dealers in turn would sell the automobiles to retail customers; both the dealers and their customers relied on the false odometer readings and paid more for the automobiles than they would have paid had they been aware of the true mileage. To obtain titles in the names of the purchasers, a necessary prerequisite to the marketability of the cars, the dealers mailed Wisconsin title applications to the Wisconsin Department of Transportation. Ibid. The government maintained that petitioner caused the mailings for the purpose of executing the scheme (id. at xliv (indictment)).

2. Petitioner was charged under 18 U.S.C. 1341, which prohibits the use of the mails for the purpose of executing a scheme to defraud or in order to obtain money or property by false and fraudulent pretenses. Violations of Section 1341 are punishable by up to five years' imprisonment and a fine of up to $1,000. Prior to trial, petitioner requested a lesser included offense instruction under Fed. R. Crim. P. 31(c), which provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." Petitioner asked the district court to instruct the jury that it could convict him under 15 U.S.C. 1990c. Under Section 1990c, it is a misdemeanor to violate 15 U.S.C. 1984, which forbids anyone to "disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the

number of miles indicated thereon." The court declined to give the requested instruction.

Prior to trial, petitioner also asked the district court to dismiss the indictment, arguing that it failed properly to allege that the mailings of title applications by the dealers furthered the fraudulent scheme (see Pet. App. xlvi). The district court denied the motion, holding that it was enough for the indictment to allege that the mailings were caused by petitioner for the purpose of executing the scheme and that the question whether the mailings actually furthered the scheme was one for the jury (ibid.). At trial, petitioner did not dispute the evidence that he tampered with the odometers. His defense rested largely on the claim that the mailings were not in furtherance of his fraudulent scheme because they were not necessary to the scheme's success and in fact created a danger that he would be apprehended. See Tr. 12, 16-18.

3. a. On appeal, petitioner maintained that on the facts developed at trial no rational jury could have concluded that the mailings were in furtherance of his scheme. On that point, the panel that initially heard petitioner's appeal unanimously agreed that the facts supported a conclusion that the mailings furthered petitioner's scheme. See Pet. App. xxix (citing United States v. Galloway, 664 F.2d 161 (7th Cir. 1981), cert. denied, 456 U.S. 1006 (1982)), xl-xli (Fairchild, J., concurring on this point)).

Petitioner also contended that he was entitled to a lesser-included-offense instruction on the misdemeanor offense of odometer tampering. He argued that he was entitled to such a charge under Seventh Circuit precedent, which at that time applied the "inherent relationship" test to determine whether a lesser included offense instruction should be given (see Pet. App. xxxii). 1/ Under the inherent relationship test, a lesser

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1/ As this Court has explained, a federal defendant "is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States. (Continued)

offense is deemed to be included within a greater when (1) the facts as alleged in the indictment and as proved at trial support the inference that the defendant committed the lesser offense, and (2) there is an inherent relationship between the two crimes (id. at xxxi-xxxii). Offenses have an inherent relationship where they "relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense" (id. at xxxii (citation omitted)). Under the inherent relationship test, a lesser offense can be included within a greater even though its statutory definition contains an element not contained in the definition of the greater offense, as long as the proof at trial shows that the lesser offense was committed. 2/

The traditional "elements" test, by contrast, "requires identity of the elements of the two offenses, such that some of the elements of the crime charged themselves comprise a separate, lesser offense; to be necessarily included, the elements of the lesser offense must be a subset of the elements of the charged offense." Pet. App. v (citations omitted). Accordingly, under the elements test a lesser included offense instruction will be refused "where the lesser offense requires an element not

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412 U.S. 205, 208 (1973); see Mathews v. United States, No. 86-6109 (Feb. 24, 1988), slip op. 5. This case involves the test that should be used to determine whether a lesser offense is included within a greater.

2/ The inherent relationship test permits an instruction on an offense not listed in the indictment, the proof of which depends on facts that were developed at trial but were not alleged in the indictment. Constitutional requirements of fair notice, however, have been held to preclude the prosecution from requesting such an instruction (see Pet. App. xiii; Stirone v. United States, 361 U.S. 212 (1960) (defendant may not be convicted of crime not charged in the indictment)). Those requirements do not apply to the defendant. Under the inherent relationship test, therefore, the defendant will sometimes be entitled to an instruction that the government could not seek. The inherent relationship tests thus dispenses with the usual principle of "mutuality," under which an instruction is available to one party only if it is also available to the other. See id. at v n.1; see also Keeble v. United States, 412 U.S. 205, 214 n.14 (1973) (noting that the mutuality requirement was abandoned by first case to adopt inherent relationship test, United States v. Whitaker, 447 F.2d 314, 321 (D.C. Cir. 1971)).

required for the greater offense" (ibid.), even if that element is proved at trial.

The panel majority agreed with petitioner that under the inherent relationship test odometer tampering was a lesser offense included within mail fraud and that petitioner was entitled to an instruction on odometer tampering. The panel therefore reversed petitioner's conviction. The majority explained that, although there are any number of mail fraud schemes that have nothing to do with odometer tampering, the scheme that the prosecution proved at trial involved tampering with odometers. Pet. App. xxx-xxxi. In addition, the majority held that there is an inherent relationship between the two offenses because "[b]oth offenses protect against the same societal wrong: fraud. And it can generally be expected that proof of mail fraud will entail proof of a completed underlying 'fraud,' although this is certainly not always true." Id. at xxxii (citations omitted). Judge Fairchild dissented, arguing that mail fraud and odometer tampering are not so closely connected as to have an inherent relationship (id. at xxxix-xl).

b. On rehearing, the en banc court abandoned the inherent relationship standard and embraced the elements test. The en banc court also agreed with the panel that there was sufficient evidence to support the conclusion that the mailings were in furtherance of the scheme. Pet. App. iv.

The en banc court held that one offense is necessarily included within another for the purpose of Rule 31(c) of the Federal Rules of Criminal Procedure "only when the elements of the lesser offense form a subset of the elements of the charged offense" (Pet. App. ix-x (footnote omitted)). The elements approach, the court found, "is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendants of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the

concept of 'necessarily included' under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy." Id. at x-xi.

Mail fraud, the en banc court found (Pet. App. vi), requires that the defendant devise a scheme to defraud and that the mails be used in furtherance of that scheme, but it does not require proof that the scheme was successfully carried out. Moreover, the court of appeals observed (id. at vii) that the indictment in this case alleged that petitioner devised a scheme that involved the alteration of odometers, but not that he actually altered the odometers (see id. at xlii-xliv (indictment)). Odometer tampering under 15 U.S.C. 1984 and 1990c requires that the defendant knowingly and willfully alter or cause the alteration of an odometer with intent to change the number of miles indicated (ibid.). Accordingly, the court of appeals concluded that petitioner could have been convicted of mail fraud as it is defined in the statute and as it was described in the indictment, without any proof that he tampered with an odometer. For that reason, the court affirmed the district court's refusal to give an instruction on odometer tampering. 3/

Two judges dissented from the en banc opinion (Pet. App. xv-xxiv). 4/ They maintained that it is "inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial" (id. at

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3/ By reading the indictment as not alleging that petitioner actually tampered with odometers, the court of appeals was able to avoid deciding whether the greater and lesser offenses must be compared solely on the basis of their statutory elements, or whether a lesser offense is included within a greater when the allegations of the indictment state all the elements of the lesser offense, even though the statutory definition of the greater offense does not include all of those elements. See id. at vii, xv. Thus, in this case the court of appeals decided only that the defendant is not entitled to an instruction on an offense that is not included in either (1) the statutory definition of the offense charged or (2) the allegations in the indictment.

4/ The dissenting judges agreed that the district court properly permitted the jury to decide whether the mailings actually furthered petitioner's scheme. See Pet. App. xxiii.

xvi). According to the dissenters, it is unreasonable to define an offense solely in terms of its statutory elements: "[p]ermitting consideration of the indictment and succeeding evidence, in addition to the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the 'offense charged' in a given case, and of the lesser offenses necessarily subsumed therein." Id. at xvii.

ARGUMENT

We agree with petitioner that the definition of a lesser included offense under Fed. R. Crim. P. 31(c) presents a significant and recurring question on which the courts of appeals disagree. Accordingly, we do not oppose the grant of a writ of certiorari with respect to that issue. Petitioner's other contentions, however, are without merit and the issues they present do not warrant review by this Court.

1. a. As petitioner notes (see Pet. 13-14), the courts of appeals have taken inconsistent positions on the standard that should be used to determine whether a lesser offense is included within a greater (see Pet. App. x n.5). In this case the Seventh Circuit has explicitly rejected the "inherent relationship" test and has endorsed the "elements" test. The Third Circuit employs the elements test, see, e.g., Government of the Virgin Islands v. Bedford, 671 F.2d 758, 765 (1982) (offenses to be analyzed in the abstract in determining what is included), and has specifically declined to adopt the inherent relationship standard, Government of the Virgin Islands v. Joseph, 765 F.2d 394, 397 n.4 (1985). The Eighth Circuit has also refused to require a lesser included offense instruction where the lesser offense has elements not shared by the greater, even though the lesser offense has been proved at trial. United States v. Campbell, 652 F.2d 760, 762-763 (1981) (reserving position on mutuality requirement). 5/

5/ The Second Circuit states the test in terms of the elements of the offense, see, e.g., United States v. LoRusso, 695 F.2d 45, (Continued)

Three courts of appeals employ the inherent relationship standard. The test originated with the District of Columbia Circuit in United States v. Whitaker, 447 F.2d 314 (1971). The standard has subsequently been adopted by the Ninth Circuit in United States v. Stolarz, 550 F.2d 488, 491-493, cert. denied, 434 U.S. 851 (1977) (see also United States v. Johnson, 637 F.2d 1224, 1233-1241 (9th Cir. 1980); United States v. Martin, 783 F.2d 1449, 1451-1453 (9th Cir. 1986)), and by the Tenth Circuit, in United States v. Pino, 606 F.2d 908, 914-917 (10th Cir. 1979) (see also United States v. Zang, 703 F.2d 1186, 1196 (10th Cir.), cert. denied, 464 U.S. 828 (1983)). 6/

b. On the merits, we believe that in order for a lesser included offense instruction to be given, all the statutory elements of the lesser offense must be elements of the greater offense as well. That is, an offense cannot be regarded as a lesser included offense unless it is impossible to commit the greater offense without also committing the lesser. 7/ This approach represents the proper reading of Rule 31(c), it comports with this Court's cases on lesser included offense instructions,

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52 n.3 (1982), cert. denied, 460 U.S. 1070 (1983), but it has not specifically addressed the inherent relationship standard. The Fourth and Fifth Circuits have framed the standard in a manner consistent with the elements test but do not appear to have confronted the specific question raised here and have not commented on the inherent relationship test. See United States v. Carter, 540 F.2d 753, 754 (4th Cir. 1976); United States v. Williams, 775 F.2d 1295, 1302 (5th Cir. 1985), cert. denied, 474 U.S. 1089 (1986).

6/ Although the Tenth Circuit embraced the inherent relationship test in Pino, it has since also employed the elements test. See, e.g., United States v. Chapman, 615 F.2d 1294, 1298-1299, cert. denied, 446 U.S. 967 (1980). The definition of a lesser included offense was not a contested issue in Chapman, which turned on the compatibility of the lesser offense charge with the evidence. Recently, one member of that court has suggested that both tests should be applied: the elements test should apply to requests by the prosecution, while the inherent relationship standard should apply to requests by the defendant. United States v. Cooper, 812 F.2d 1283, 1289-1290 (1987) (McKay, J., concurring and dissenting).

7/ Thus, we believe that the question the court of appeals declined to reach -- whether the indictment can serve to characterize the greater offense in a way that includes within it all the elements of the lesser offense -- should be answered in the negative. The elements of an offense are those set forth in the relevant statute.

and it is consistent with the parallel analysis of lesser included offenses in the double jeopardy context. In addition, it promotes certainty and preserves the grand jury's authority to determine the statute under which the defendant is to be tried.

First, Rule 31(c) by its terms permits conviction of a lesser offense that is "necessarily included in the offense charged." Although that language does not conclude the inquiry, its reference to necessary inclusion does accord with a comparison of offenses in the abstract, not on the basis of the facts at trial. In addition, the elements test is recognized as the traditional approach to defining a lesser included offense (see Whitaker, 447 F.2d 318 n.11), and Rule 31(c) was designed to codify pre-existing law (Fed. R. Crim. P. 31(c) advisory committee note; see Keeble v. United States, 412 U.S. 205, 208 n.6 (1973)).

Second, although this Court has not addressed the specific question raised here, 8/ the Court's cases discuss the concept of a lesser included offense in terms of the elements of the crime. As the Court has explained, "'[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.'" Sansone v. United States, 380 U.S. 343, 349 (1965) (quoting Berra v. United States, 351 U.S. 131, 134 (1956)). See also Beck v. Alabama, 447 U.S. 625, 627-628 (1980) (felony murder a lesser offense included within intentional murder in the course of a robbery).

Third, under the Double Jeopardy Clause, the Court has held that a lesser included offense is the same offense as the greater crime only if it is "invariably true [that] the lesser offense

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8/ In Keeble, 412 U.S. at 214 n.14, the Court noted that Whitaker had abandoned the traditional rule of "mutuality," but the Court did not address the question of the proper test to be used in determining whether a lesser included offense instruction should be given.

* * * requires no proof beyond that which is required for conviction of the greater" (Brown v. Ohio, 432 U.S. 161, 169 (1977)). In Brown (see 432 U.S. at 166), the Court drew on its holding in Blockburger v. United States, 284 U.S. 299, 304 (1932) (citation omitted), that two offenses are the same when they have the same statutory elements: "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The Blockburger test, however, would not be satisfied by the inherent relationship standard, which permits an offense to be included within another even though each requires proof of a fact that the other does not. The Court's double jeopardy jurisprudence thus confirms that the statutory elements standard embodies the natural understanding of what constitutes a lesser included offense. 9/

Fourth, the statutory elements test has the advantages of simplicity and certainty. Because it requires that statutes be compared in the abstract and does not involve the inferences that might reasonably be drawn from the evidence at trial, the test makes it possible to predict before trial the offenses on which the jury will be instructed, enabling both sides to plan their strategies acccordingly. And because it does not turn on easily contestable factors such as what the evidence at trial showed and whether two offenses are "inherently related" in light of the proof at trial, the elements test should also minimize litigation over whether a lesser included offense instruction should have been given in a particular case.

Finally, because it permits the jury to consider only the crime listed in the indictment (or one established by statute as

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9/ As in the double jeopardy context, we submit that satisfying the elements test is a necessary, but not sufficient condition for the creation of a lesser included offense. See Garrett v. United States, 471 U.S. 773 (1985). If Congress intends to create entirely separate offenses, a lesser included offense instruction is not appropriate even if the elements of the lesser offense are all included within the greater.

a lesser included offense), the statutory elements test accords with this Court's recognition that the responsibility for selecting the statute under which the accused will be prosecuted falls to the grand jury. See United States v. Batchelder, 442 U.S. 114 (1979); Garrett v. United States, 471 U.S. 773, 789-790 n.2 (1985). If the grand jury wishes to charge the defendant with two closely related offenses, it is free to do so. But when a court decides, at the end of the case, to instruct the jury on a crime not charged in the indictment, simply because that crime is closely related to the crime that was charged, the court is preempting the grand jury's role in determining the scope of the indictment. Under the elements test, the grand jury knows that the defendant will be tried only on the offense that it selects, together with any lesser included offenses specifically created by Congress. Under the inherent relationship test, the defendant may end up being subject to trial and conviction on a charge that the grand jury did not contemplate, or even one on which it expessly declined to indict.

2. Petitioner also contends (Pet. 20-22 (citations omitted)) that as a matter of law his actions could not have constituted mail fraud, "because the mailing of title documents by the victims of his odometer tampering scheme were counterproductive to his scheme, or at most routine mailings, intrinsically innocent." The court of appeals correctly concluded that a rational jury could find that the mailings were "for the purpose of executing" (18 U.S.C. 1341) petitioner's scheme.

Petitioner does not contend in this Court that he did not cause the mailings. See Pereira v. United States, 347 U.S. 1, 8-9 (1954) (defendant causes mailings when they are foreseeable result of his actions)). Relying on this Court's decision in United States v. Maze, 414 U.S. 395 (1974), however, petitioner maintains (Pet. 21) that his scheme did not depend on the mailings for its success, because he realized his illicit gain

before the dealers sent in the registration applications. Petitioner also asserts (Pet. 21-22) that the mailing of those applications increased the chance that he would be apprehended.

Petitioner is wrong in asserting that the mailings "did nothing to assist" him (Pet. 22). On the contrary, the mailings were "'for the purpose of executing the scheme, as the statute requires'" (Maze, 414 U.S. at 400, quoting Kahn v. United States, 323 U.S. 88, 94 (1944)). The automobile dealers whom petitioner defrauded used the mailings to obtain titles for their customers, which made the cars marketable. The dealers' ability to register the automobiles, in turn, made it possible for petitioner to defraud the dealers on an ongoing basis (see Pet. App. v (of 12 mailings alleged in the indictment, four made by one dealer and five by another)). 10/ As the court of appeals explained in the case on which it relied here, United States v. Galloway, 665 F.2d 161, 165 (7th Cir. 1981), cert. denied, 456 U.S. 1006 (1982), "[o]nly the experience of a successful title transfer, therefore, would induce the dealer * * * to purchase other automobiles from [petitioner]. Any failure in the title application process would have endangered [petitioner's] scheme by discouraging the retail dealer from making further purchases of his automobiles."

Thus, this case is significantly different from Maze, in which the defendant committed a series of isolated credit card frauds and had no interest in the mailings through which his victims billed the bank that issued the credit card. The mailings in Maze were not necessary to Maze's victims' continued participation in his scheme, because that scheme did not depend on the continuing confidence of particular victims in the legitimacy of their transactions with Maze.

Petitioner is wrong in relying on any increased risk of apprehension created by the mailings. 11/ The fact that some

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10/ The evidence at trial showed that petitioner's scheme was quite extensive, involving roughly 150 automobiles between 1978 and 1980. Tr. 102.

(Continued)

step in a fraudelent scheme could conceivably bring the operation to the authorities' attention does not keep it from contributing to the scheme's success. In Maze, the Court explained (414 U.S. 403) that the mailings did not contribute to the success of the scheme and observed that in fact they made the defendant's arrest more likely; the Court did not suggest, however, that because the mailings created that risk they could not possibly have furthered the scheme. 12/

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Question 1. In all other respects the petition should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

APRIL 1988

11/ Petitioner implies (Pet. 22) that the mailings caused his fraud to be detected. That is not correct. Petitioner was apprehended because of complaints by purchasers (Tr. 123). Testimony at trial indicated that although it was theoretically possible for the information contained in the mailings to have led to petitioner's detection, that was not likely, because the applications submitted by the dealers would not, by themselves, show that the odometers had been altered (Tr. 111-112).

12/ Petitioner also argues (Pet. 19-20) that review by this Court is necessary in order to maintain respect for stare decisis. The suggestion that en banc reconsideration of a court of appeals' prior cases is somehow inappropriate, or is a basis for review in this Court, is obviously without merit. The en banc mechanism is designed to strike the appropriate balance between the need for stability in the law and the requirement that cases be decided correctly.

(4)

No. 87-6431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 16, 1988
CERTIORARI GRANTED MAY 16, 1988

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8-23-83	Indictment
9-21-83	Arrg. WLG. Apps: Johnson for govt. Steinberg for deft w/deft present. PLEA: N.Guilty entered by crt because deft stands mute on 12ct indictment. *PTO entered* for 10-6-83 at 2:00pm.
10-5-83	Mo to dism indictmt.
10-24-83	Memo in suppt of deft's mo to dism the indictmt.
10-27-83	Memo in oppost to dism by govt.
11/1/83	Deft's Reply Brf.
11-14-83	Order to dism indictmt denied.
12-12-83	Deft's prop addtl voir dire instructs. and prop jury instructs.
12-12-83	Deft's memo in suppt of prop jury instructions.
12-13-83	Govt's prop jury instructions.
12-15-83	FPTC. BBC. Apps: Vaudreuil for govt. Deft. w/ Atty Salzberg. Trial length: 2-3 days Discuss on voir dire and instructs.
12-16-83	FPTC ORDER.
12/19/83	JURY SEL & 1ST DAY. Jury panel selected & sworn. Jury List. Testimony.
12-20-83	2ND DAY J. TRIAL. Instructions, jury ret'd verdict of Guilty on each of 12 counts. Mo/JA-denied. 30 day PSI. Sentc'g set: 2/13/84, at 1:00 PM.
12-20-83	Verdict Form
12-20-83	Deft's Mo for Judgmt of Acquittal at close of Govt's case.
12-20-83	Deft's Memorandum in spt of Mo/JA.
12-20-83	Jury Instructions.

DATE	PROCEEDINGS
12/27/83	Deft's. Mo/Jdgmt of Acquittal or Alternative for New Trial.
12-29-83	Deft's mo for acquittal or, in altern, for a new trial is DENIED.
2/24/84	SENTENCING, BBC, apps: AUSA J. Vaudreuil, Atty Salzberg, deft. Ct 1: 90 days inpr, recommend work release not be granted. Cts 2 thru 12: Fined $50; ISS as to impr only & placed on proba for 4 yrs, to commence upon release fm confinement on Ct. 1. Fines payable w/in 6 mos of termination of proba. Sent. stayed pending Appeal.
2/24/84	Deft's Notice of Appeal
2/24/84	J&C.
3/12/84	Deft's Mo to supplement record on appeal; Stipulation re: Omission fm record. (deft's modified proposed J. Instr)
3/13/84	ORDER, granting deft's mo/supplement appeal record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

vs.

WAYNE T. SCHMUCK,
Defendant.

INDICTMENT

[Filed Aug. 23, 1983]

18 U.S.C. §§ 1341 and 2

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH TWELVE

1. At all times pertinent to this indictment, WAYNE T. SCHMUCK did business in the name of Big Foot Auto Sales, located in Harvard, Illinois.

2. From on or about July 1, 1979 and continuing until on or about July 30, 1980, the defendant,

WAYNE T. SCHMUCK

did devise and intend to devise a scheme to defraud persons in the State of Wisconsin (hereinafter referred to as "Wisconsin customers"), who would be and were induced to purchase automobiles from Wisconsin automobile dealers (hereinafter referred to as "Wisconsin dealers"), on which WAYNE T SCHMUCK had caused the odometer mileage reading to be altered so that the odometer indicated a mileage reading which was sub-

stantially less than the true and correct mileage for that automobile.

3. It was a part of this scheme that WAYNE T. SCHMUCK would and did in the course of his business purchase used automobiles from individuals and auto auctions in Illinois, Wisconsin, and elsewhere, for resale to various persons, including automobile dealers in Wisconsin.

4. It was further a part of the scheme that WAYNE T. SCHMUCK would cause the odometer mileage reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile.

5. It was further a part of the scheme that WAYNE T. SCHMUCK would and did prepare an odometer mileage statement for each of the automobiles referred to in paragraph 4 on which was entered the odometer mileage reading as WAYNE T. SCHMUCK had caused it to be altered.

6. It was further a part of the scheme that WAYNE T. SCHMUCK would offer these automobiles to purchasers at the used car lot of Big Foot Autos in Harvard, Illinois, including automobile dealers from the State of Wisconsin.

7. It was further a part of the scheme that Wisconsin dealers purchasing each automobile would and did pay WAYNE T. SCHMUCK for the automobile and that WAYNE T. SCHUMCK would and did provide each Wisconsin dealer with an original odometer mileage statement reflecting the mileage as WAYNE T. SCHMUCK had caused it to be altered.

8. It was further a part of the scheme that the Wisconsin dealers would offer these automobile in Wisconsin for sale to Wisconsin customers (or, in some instances, to other Wisconsin dealers,) and that the Wisconsin

dealers would and did prepare an odometer mileage statement for each of the automobiles on which was entered the mileage as it appeared on the automobile odometer, which, because WAYNE T. SCHMUCK had caused it to be altered, did not reflect the true and correct mileage for that automobile.

9. It was further a part of the scheme that in purchasing each of these automobiles, the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage reading as it appeared on the automobile odometer and on the odometer mileage statements provided by WAYNE T. SCHMUCK and further that the Wisconsin dealers and Wisconsin customers would and did pay more for each automobile than would have been paid if the odometer mileage reading had not been altered.

10. It was further a part of the scheme that each Wisconsin dealer who purchased an automobile from WAYNE T. SCHMUCK would and did submit a Wisconsin title application form to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, in order to obtain a Wisconsin title in the name of the Wisconsin dealer or on behalf of and in the name of the Wisconsin customer.

11. On or about the dates set forth below, in the Western District of Wisconsin, the defendant,

WAYNE B. SCHMUCK,

for the purpose of executing this scheme, did cause to be delivered by mail according to the direction thereon, mail matter to be sent and delivered by the United States Postal Service, to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, 4802 Sheboygan Avenue, Madison, Wisconsin, from the Wisconsin dealer indicated, containing in each instance a Wisconsin title application form pertaining to a particular automobile described below:

Count	Approximate Date of Mailing	Wisconsin Dealer	Automobile Description and Serial Number
1.	July 25, 1979	Cameron Auto Sales 7-19 Received 7-21 Tranferred Cameron, Wisconsin	1973 Chevrolet 1Y17K3W156990
2.	September 26, 1979	Southside Auto 6-30 9-18 Cameron, Wisconsin	1977 Chevrolet CCL447J129679
3.	November 8, 1979	P and A Sales 11-7-79 8-1-80 Bloomer, Wisconsin	1977 Mercury 7274A602435
4.	February 18, 1980	Southside Auto 1-12-80 2-14-80 Cameron, Wisconsikn	1977 Chevrolet CKR247F325035
5.	February 27, 1980	Grass Motor Sales 2-7-80 2-23-80 Bloomington, Wisconsin	1977 Buick 4V69K7H514944
6.	March 21, 1980	P and A Sales 3-13-80 3-15-80 Bloomer, Wisconsin	1978 Ford 8P63H127461
7.	March 31, 1980	P and A Sales 2-27-80 3-24-80 Bloomer, Wisconsin	1973 Chevrolet CCY243J126096
8.	May 27, 1980	P and A Sales 4-19-80 5-19-80 Bloomer, Wisconsin	1975 Ford F10GLW04097
9.	May 5, 1980	P and A Sales 4-5-80 4-29-80 Bloomer, Wisconsin	1975 Ford 5G21H139390
10.	June 9, 1980	Hi Way Service Garage 3-24-80 6-5-80 Marshfield, Wisconsin	1975 Ford 5X11Y215161

Count	Approximate Date of Mailing	Wisconsin Dealer	Automobile Description and Serial Number
11.	June 27, 1980	Southside Auto 5-1-80 6-23-80 Cameron, Wisconsin	1977 Dodge NH45C7B100810
12.	July 2, 1980	Southside Auto 6-30-80 6-14-80 Cameron, Wisconsin	1977 Dodge NL41C7F292674

(All in violation of Title 18, United States Code, Sections 1341 and 2.)

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ John R. Byrnes
JOHN R. BYRNES
United States Attorney

Indictment returned: 8/23/83.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WAYNE T. SCHMUCK,
Defendant.

STENOGRAPHIC TRANSCRIPT

of Final Pretrial Conference had to the Court in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JAMES E. DOYLE, Judge, presiding, on Thursday, the 6th day of October, 1983, commencing at 2:00 p.m.

APPEARANCES

The plaintiff appeared by THOMAS D. SYKES, Assistant United States Attorney, Madison, Wisconsin.

The defendant, Wayne T. Schmuck, was present in person and by HARRY SALZBERG, Attorney at Law, Salzberg & Steinberg, 108 King Street, Madison, Wisconsin 53703.

* * * *

[4] THE COURT: I will provide then that the defendant's brief in support of the motion be served and filed by October 20th. The Government's answer be by October 27 and the defendant's reply by November 1.

Counsel, just one moment. It's possible that this is something that is familiar to both of you, counsel, but just in case it isn't, I want to mention that although I've been called in only for this specific temporary purpose and although I've examined the Indictment only very quickly in preparation for this conference, I note that it does resemble a number of Indictments that were returned in this court at various times in the past and specifically Indictments that were returned in several cases, perhaps—perhaps as long as about three years ago or so. All I want to do is to make sure that you are aware that at that time, about three years, maybe four years ago, similar Indictments were challenged very sharply and in particular it was contended, and I don't attempt to state the point with great precision, but it was contended that the mailings that are referred to and relied upon, which I think is a mailing—are mailings from the Wisconsin dealers to the Wisconsin Department of Transportation, are not fairly or lawfully to be attributed to the defendant in terms of criminal responsibility.

My recollection, and I'm doing this entirely from recollection without looking back at the records about this, [5] but my recollection is that the point was raised and disputed in a case that I administered and also in a case that Judge Crabb administered and that I wound up holding for the Government on the question and Judge Crabb held for the defendant on that question, I believe. One of those cases went to the Seventh Circuit and the Seventh Circuit held for the Government.

That's all. I just want to make you aware of that and I think it should be relatively easy to find the case.

MR. SALZBERG: Thank you, Your Honor. Yeah, I'm aware of the *Galloway* case which is the case that did go to the Seventh Circuit. However, I believe that our case can be distinguished from the *Galloway* case and I therefore would—I have submitted these motions after reading the *Galloway* case.

THE COURT: Thank you.

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Maureen Beilke
Official Court Reporter
4-6-84
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE T. SCHMUCK,
Defendant.

ORDER

Defendant has moved to dismiss the indictment against him on the ground that it fails to allege facts which would support a conviction under 18 U.S.C. § 1341.[1]

Defendant contends that the indictment is deficient in failing to set out specifically that the mailings which were alleged to be in furtherance of defendant's scheme did not endanger the success of defendant's scheme. Defendant argues that such an allegation is necessary in view of the holding of the United States Supreme Court in *United States v. Maze*, 414 U.S. 395 (1973), to the effect that mailings which actually enhance the probability of detection are not within the purview of the statute.

Defendant is correct in his understanding that a conviction could not stand if it were based upon mailings

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[1] Defendant has also moved to dismiss on the ground that the indictment fails to charge an offense under 18 U.S.C. § 1342. Since the indictment does not purport to charge an offense under this section but, rather, under §§ 1341 and *2*. I have not considered defendant's arguments in this regard.

that did not actually "further" the scheme to defraud. However, that is a matter to be determined at trial. The indictment is sufficient if it merely alleges that the mailings were caused by the defendant for the purpose of executing the scheme. The indictment in this case includes the requisite allegations.

ORDER

Defendant's motion to dismiss the indictment against him is DENIED.

Entered this 11th day of November, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK
Defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Comes now defendant Wayne T. Schmuck by and through his attorney, Harry E. Salzberg, and respectfully requests the Court to include the following instructions in the Court's charge to the Jury

* * * *

DEFENDANT'S PROPOSED INSTRUCTIONS
ON LESSER INCLUDED OFFENSE

The crime of mail fraud with which the defendant is charged in the indictment includes the lesser offense of odometer tampering.

If you find the defendant not guilty of the crime of mail fraud charged in the indictment or if you cannot unanimously agree that the defendant is guilty of that crime, then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of odometer tampering.

Seventh Circuit instructions 2.03 (as modified)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK
Defendant.

MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS

1. DEFENDANT IS ENTITLED TO HIS INSTRUCTION ON THE LESSER INCLUDED OFFENSE

Defendant is charged in the indictment with 12 violations of 18 U.S.C. sec. 1341 (Mail Fraud). The indictment sets forth allegations of a scheme involving odometer tampering, which is prohibited under 15 U.S.C. sec. 1984;

> "No person shall . . . cause to be . . . reset or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon".
>
> Paragraph 4 of the indictment charges: "It was further a part of the scheme that WAYNE SCHMUCK would cause the odometer mileage reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile."

The defendant is entitled to an instruction on a lesser included offense where, on the facts of the case,

> "the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser—included offense,"

Sansone v. United States, 380 US 343, 13 L. Ed. 2d 882 (1965).

In *United States v. Stolarz*, 550 F. 2d 488 (CA 9 1977), cert. den. 434 U.S. 851, L. Ed. 2d 119, defendant was charged with assaulting a fellow prisoner with intent to do murder, contrary to 18 U.S.C. sec. 113(a).

Defendant was convicted, over his objection, of assault with a deadly weapon with intent to do bodily harm, contrary to 18 U.S.C. sec. 113(c). Although 18 U.S.C. sec. 113(c) requires use of a weapon, an element not included in the statutory definition of 18 U.S.C. sec. 113(a), the conviction was upheld, since the court found an inherent relationship between the offenses, see *United States v. Whitaker*, 447 F. 2d 134 (D.C. Cir. 1971), and the use of a deadly weapon (a Knife) was alleged in the indictment.

In *United States v. Pino*, 606 F. 2d 908 (CA 10 1979), the court reversed a conviction for involuntary manslaughter for failure to charge, as a lesser offense, careless driving. Although the involuntary manslaughter statute requires no proof of use of a vehicle, the Court looked to the facts of the offense, and the practical test of *Whitaker, supra.*

In *Whitaker, supra*, defendant was convicted of burglary, which does not require unauthorized entry, but does require intent to commit a crime within the building entered. The proof at trial was that Whitaker battered down the door of the house, which amounted to unlawful entry, against the occupant's will. The Court reversed, holding that on the facts an instruction on the lesser offense was required:

> "defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense,

Whitaker, supra 447 F. 2d 319

The Ninth Circuit has followed the inherent relationship test as recently as *United States v. Johnson*, 637 F. 2d 1224 (1980).

In *United States v. Stavros*, 597 F. 2d 108 (1979), a wagering tax conviction, the Seventh Circuit considered what constituted a lesser included offense so as to bar on double jeopardy grounds conviction for both a greater and a lesser offense.

The Court noted that:

> "When a statute can be violated in different ways we must look to the facts alleged in the indictment to determine what constitutes a lesser included offense,"

Stavros, supra 597 F. 2d at 112.

Since the offense of odometer tampering must necessarily be proved in order to sustain the charge of mail fraud in this case, the lesser included offense instruction is appropriate.

2. DEFENDANT IS ENTITLED TO HIS INSTRUCTION ON THE ISSUES IN THE CASE

Defendant is entitled to an instruction on the issues in the case which informs the jury that the mailings alleged to constitute mail fraud must have been done in execu-

tion of, and furtherance of, the fraudulent scheme. *United States v. Maze*, 414 U.S. 395, 38L, Ed. 2d, 603 (1974), establishes that there must be a sufficient connection between the mailings and the accomplishment of the fraudulent scheme;

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this: instead, it required that the use of the mails be "for the purpose of executing such scheme or artiface. . . ."

Maze, supra, at 414 U.S. 405.

In Maze, the mailings were one step in the eventual uncovering of the fraud. Likewise, in *U.S. v. Galloway*, 664 F. 2d. 161 (CA 7 1981), the Court analyzed the facts to determine if the mailings were in execution of and furtherance of, the scheme. In reinstating Galloway's conviction, the Court found, on the facts,

> "these mailings were thus *more* than "normal concomitants" of an essential transaction, they were an integral part of that transaction. They were essential to executing the scheme to defraud,"

Galloway, supra, at p. 163

and:

> "Certainly the mailings were no *counterproductive* to the scheme, as were the mailings in Maze," ld. at 164.

The question of the utility of the mailings to the scheme is in essense a question of fact for the jury.

3. DEFENDANT IS ENTITLED TO AN INSTRUCTION ON THE THEORY OF HIS DEFENSE INSTRUCTION

Whether or not the offense of odometer tampering is considered a lesser included offense, the defendant is en-

titled to have the jury informed of his theory of the defense, that is, that the government has charged him with a crime he did not commit, rather than the crime he did commit. The general rule is that the defendant is entitled to an instruction on any theory of defense which is supported by some evidence, however slight, see *Devitt & Blackmar*, sec. 13.07, citing *United States v. Lehman*, 468 F. 2d 93 (CA 7 1972), cert. den. 409 U.S. 967.

Dated: ————.

Respectfully Submitted,

/s/ Harry Salzberg
HARRY SALZBERG
Attorney for Wayne Schmuck
108 King Street
Madison, WI 53703
(608) 256-4771

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

———

Case No. 83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WAYNE T. SCHMUCK,
Defendant.

———

STENOGRAPHIC TRANSCRIPT

of proceedings had upon Final Pre-Trial Conference to the Court in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable BARBARA B. CRABB, Judge, presiding, on Thursday, the 15th day of December, 1983, commencing at 1 p.m.

[2] APPEARANCES

JOHN W. VAUDREUIL, Assistant United States Attorney, 215 Monona Avenue, Madison, WI 53701, appeared on behalf of the Plaintiff.

HARRY E. SALZBERG, 108 King Street, Madison, WI 53703, appeared on behalf of the Defendant.

ALSO PRESENT

WAYNE T. SCHMUCK, Defendant.
ATTORNEY PETER STEINBERG

* * * *

PROCEEDINGS

(Whereupon, proceedings in the above-entitled criminal action commenced in open court as follows:)

* * * *

[4] THE COURT: Let me see. Are you saying that the only factual matter that you're going to contest is—let me start again. You're saying the only matter you plan to contest is whether the mailings sent to the Wisconsin Department of Transportation constituted a mailing in furtherance of the crime?

MR. SALZBERG: Well, the main factor we are going to be contesting is whether those mailings constituted mail fraud. We would not be contesting the odometer tampering scheme itself but only whether the odometer tampering scheme constituted mail fraud.

THE COURT: Well, Mr. Salzberg, you're probably aware that that point has been quite conclusively resolved in a case where that was the only issue in *United States v. Galloway*. The Court of Appeals reversed my decision in which I said I didn't think that mailings that were sent in the normal course of business to register cars constituted part of a scheme to defraud, and the Seventh Circuit said quite clearly they did.

MR. SALZBERG: Yes, Your Honor, we are very well aware of that case. We have gone through it quite closely, and we feel that we can distinguish our case from that case; and we can show that the mailings in this case were counterproductive to the scheme and, therefore, could not be in furtherance of this scheme based on certain distinctions in our case. [5] Nonetheless, we do feel it is a matter for the jury to decide whether in fact the mailings furthered the schemes, and we don't believe that *Galloway* stands for the proposition that the jury should not decide whether the mailings furthered the schemes.

THE COURT: Well, as far as whether or not the—well, let's talk about how this is going to go forward. If you're not intending to contest anything but the mailings

and what the mailings were for, is it necessary for Mr. Vaudreuil to go through all of the other evidence that he would be otherwise putting on?

MR. SALZBERG: Mr. Vaudreuil and I have stipulated to certain matters already in order to try to shorten the trial.

* * * *

[11] THE COURT: So, I guess, Mr. Vaudreuil, that it boils down to this: That you think it's a matter of law that the mailings to the Wisconsin Department of Motor Vehicles furthered the scheme, and Mr. Salzberg thinks that that's something that the jury should be left to decide.

MR. VAUDREUIL: I think that boils it down, that's right.

THE COURT: Okay.

MR. VAUDREUIL: Does the Court want me to speak to this at this time or—

THE COURT: Yes, why don't you.

MR. VAUDREUIL: And that I guess goes to the government's requested Instruction No. 6. I would certainly concede, as the instruction points out, that whether mailings occurred, and basically that's for the jury to decide, but I think in this case that this mail fraud case, we're in probably a position that may be unique to mail fraud cases in that mail fraud generally is or each one is almost a being unto itself. And whatever the mailings are like are perhaps different, and it may be more of a jury question. But in this situation it seems that basically the identical case to *Galloway*. Actually I think the facts here in terms of the mailings being in furtherance and being caused by the defendant would be more closely [12] aligned, because the absence as the proof will show, the cars didn't go through the Chicago Auto Auction and those various things. They were basically sold by Mr. Schmuck to a Wisconsin dealer, who sold them to a guy on the street; and the dealer mailed in the title, all within a fairly short period of time.

So, the reason that I think, as I have drafted it, is that if the jury finds that that scheme to defraud occurred, the rollbacks, and I guess there's or there isn't going to be much of a dispute there, and they find those dealers then sent those documents to the Department of Motor Vehicles, to allow the jury to in a sense decide whether or not they're in furtherance or not in furtherance without—well, it is to basically allow them to decide in contradiction to what the Seventh Circuit has said is the law on this kind of a case in these mailings.

It seems to me that these mailings or that the Court, and perhaps my instruction could be improved upon in terms of wording. But to instruct the jury they must find or that if they find certain underlying facts, basically the facts as I see that they would come out, and as I guess they came out in *Galloway*, then the Seventh Circuit has held that those are in furtherance of a scheme to defraud of this type. And I think that's—since the law is clear, we have to give the jury an instruction, give them guidance. And I think basically the Court does not take the issue from the jury. If they don't find those facts, [13] then they don't go on to find any furtherance, obviously.

THE COURT: It would probably be necessary, if we were to use your Request No. 6, to add that the jury has to find that it was reasonably foreseeable that Mr. Schmuck would know that the documents would be mailed in.

MR. VAUDREUIL: I think that's correct, Your Honor, because I think that's the language that comes from *Galloway* and that I actually—what?—18 lines ahead put in there by saying that or in the initial Instruction No. 4 I think I have given the jury a finding. I guess that the odometers were altered and that Mr. Schmuck knew they were; that he sold them and that he was or that it was reasonably foreseeable that the documents would be mailed, and the documents were then mailed. I think it is a matter of law that they have to be told that that is in furtherance.

THE COURT: Mr. Salzberg, I will hear you on that.

MR. SALZBERG: We would take issue. We would take serious issue with that instruction, Your Honor. First of all, we feel that the *Galloway* case did not, when this Court or when the Seventh Circuit overturned this Court's directed verdicts in this case, it simply ruled that the jury in that particular case had enough evidence to find that the mailings furthered the scheme.

The *Galloway* case did not rule that as a matter of law whenever there's a fraud, a scheme to defraud and then a mailing, [14] that the mailings furthered the scheme. And we would direct the Court's attention, as I have in my brief on the indictment, to Footnote 7 of the *Galloway* case itself, where the Court said, that the Court noted that no, quote, nowhere on the title documents were odometer readings required. "Such a requirement, of course, might have made detection of the scheme more likely." And we assume it would have taken or it would have made the scheme more—it would have meant that the mailings were not in furtherance of the scheme, because it would have caused the likelihood of detection.

In our case the odometer readings are included on the title applications, and we feel this distinguishes our case from the *Galloway* case. And, therefore, it is still a matter of fact for the Jury as to whether the mailings furthered the scheme.

THE COURT: Do you have a copy of *Galloway* with you?

MR. SALZBERG: Yes, Your Honor.

MR. VAUDREUIL: I have an extra. I have got an extra copy, Your Honor,—

THE COURT: Thank you.

MR. VAUDREUIL: —which John Byrnes requires me to keep around at all times.

MR. SALZBERG: Your Honor, could I direct your attention, while you are reading the case, to the opening on the first page there, which states that, Following a jury verdict [15] of guilty, the trial court directed a

verdict for the defendant. The Court said: Because we find that the jury properly could have found that this scheme falls within the strictures of the federal statute, we reversed the trial court's ruling. And when Your Honor is ready, I would like to direct your attention to one other aspect.

THE COURT: I am not quite ready, thank you. I wanted to re-read Note 7. All right, Mr. Salzberg.

MR. SALZBERG: Your Honor, also the *Galloway* Court states that the *Maze* Court or the United States Supreme Court, and this is on the—I guess it's the third page of the *Galloway* decision. I don't have the page number on my copy. Okay. Excuse me. Fifth page under Section C where it discusses the *Maze* case. You see that paragraph starts, "The Court emphasized that the statute, although it has been read broadly," you see that paragraph?

THE COURT: Right.

MR. SALZBERG: At the end of that paragraph the Court states, "Indeed, the Court emphasized, these mailings endangered the scheme by furthering the likelihood of detection. "Given this fact, the mailings could not fairly be said to have been in furtherance of the scheme."

And then the Footnote 7 that I referred to earlier, we believe that given this or given this statement by the Court, it is still a matter of or still a matter for the Jury to decide [16] as to whether the mailings were in furtherance of the fraudulent scheme. It would be erroneous for the Court to take that matter out of the hands of the Jury.

THE COURT: Mr. Vaudreuil, do you want to add anything?

MR. VAUDREUIL: Not really, Your Honor. I have nothing to add.

THE COURT: My recollection, although I haven't checked this, is that in *Galloway* that was part of the jury's finding. That is, whether the mailings furthered the scheme to defraud. I am going to leave it up to the

Jury to determine whether or not the mailing did further the scheme. So, probably I'll have to revise Government Request No. 6. I'm not sure that I want to break this down into four sections the way that the defendant has suggested.

* * * *

[18] THE COURT: Okay, good. All right. Anything else?

MR. VAUDREUIL: Yes, Your Honor.

THE COURT: Yes.

MR. VAUDREUIL: Well, I think it would be appropriate, and I guess maybe when we were on the instructions I could have brought it up, to include at least the lesser-included offense request.

THE COURT: Thank you. And I meant to do it, and I forgot about it. Mr. Salzberg, I wasn't sure that I understood your point about the lesser-included offense.

MR. SALZBERG: We had to brief the point, Your Honor. What we were trying to bring out is that the Seventh Circuit decision in the *United States v. Stavros* that we have cited that's 597 F.2d 108, we would request that the Court follow that decision, which states that when a statute can be violated in different ways, we must look to the facts alleged in the indictment to determine how we would reach a lesser-included offense. We would go through from there to saying that since the offense of odometer tampering must necessarily be proved in this case in order to sustain a charge of mail fraud, given [19] the wording of the indictment, that the lesser-included offense of odometer tampering is appropriate in this case.

THE COURT: Mr. Vaudreuil, do you wish to comment on that?

MR. VAUDREUIL: Yes, Your Honor. I don't think this is an appropriate case for that lesser-included instruction being given. I think that the test for a lesser-included is set out in Mr. Salzberg's brief, and I think it is set out in a little more detail. Well, I guess they

quote in detail the *Whitaker* case and the *Bauer*, I guess it is Page 12 or whatnot of *Bauer's Instructions;* and they talk about it and what needs to be present before a lesser-included would be given.

And the first one or one of the first comments they make is that it is not necessarily clear that the *Whitaker* approach of more of a practical approach, rather than a more mechanical comparing of the elements, whichever one is necessarily favored. So I don't think that's necessarily decided.

But going on to the requirements that must be present, there must be this identity of elements; and I don't think that's present here, first of all. I think if the proof came out or if the proof were that Mr. Schmuck had participated in the scheme to defraud by not causing the rollbacks but by buying a car or taking a car knowing it had been rolled back and still selling it in his scheme, I think it would be sufficient to convict. We may end up or we would maybe end up with [20] a discussion about whether he was on proper notice or whatever. I don't anticipate that being the evidence, I should state. In fact, I don't think it will be.

But the element in a mail fraud, being the scheme to defraud in this case, it being charged in one fashion, but I don't think necessarily you—you wouldn't necessarily have to prove that he had—either that he had committed a lesser-included or the tampering crime. But I think more strongly arguing against giving it is the requirement that the additional element in the greater crime or the requirement that that be in dispute and really in dispute. I would cite the case of *United States v. Busic.* That is B-u-s-i-c. 592 F.2d, Page 13. It is a '78 Second Circuit case where they discussed lesser included and specifically discussed this, how much the element has to be in dispute. And they said the following, "Thus a defendant is not entitled to a lesser-offense charge merely because he formally contests elements of the greater charge which distinguish it from the lesser. The contest

must be real. He must produce enough evidence to justify a reasonable juror in concluding that he committed the lesser offense but did not commit the greater offense." And they go on to talk about lesser offense charge not being available, on the ground that that would just allow him to plead for mercy, which I think we would all agree to. In this case there doesn't seem to be any dispute that there was a scheme to defraud. The [21] question, I guess, would be regarding or relating to mailings. I don't think there will be any serious dispute that the mailing occurred, and I guess that the argument will be at least some argument that as to whether these were actually furthering the scheme.

Now, I think that—I don't think there's really that much dispute on that, given that I don't think there will be much or I don't think there will be much of a dispute factually; and I think the defendant in a sense has stated that in his requested theory of defense instruction. He states, well, that his—he has pleaded not guilty, and this plea puts an issue in each of the four elements. I think that's the type of formality of putting something in issue that *Busic* was talking about, and I think here to instruct the Jury on the lesser included would violate that principle. Basically it would allow the jury to just decide which charge they like better. I know that it's the defendant's position, and not something they could articulate at trial, that the executor, being our office, should have charged the tampering and not in a mail fraud, since it's been determined that's a proper charge. It is the executive decision. And I think to give a lesser included put in this case on these facts, puts the jury in the position of deciding which charge they like better. And when you get to that, you always get—it seems to me at least that you always get to the point of a basic or basically being [22] a sympathy plea or not, which would whether it is articulated or not, and I don't think that's proper and I don't think the jury can be in that position properly, and I guess for those reasons I don't

think the lesser-included offense charge here is appropriate.

THE COURT: I agree, and I would not give one on the facts of the charge in this case. Also, about the theory of the defense instruction, I would not give it in the form that you have got it. I don't consider that that's a defense. I don't think it is up to the jury to make a decision whether the government properly charged the defendant with a crime. The jury's decision is to decide whether the government's proved the elements of the crime charged. That is, that charged your client with, and not to decide whether the government charged him with the proper crime. If the government or if they find the government didn't prove the elements, they can acquit the defendant. If they find that the government did prove the elements, then they can find him guilty. But that's the extent of their role.

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathleen Banks
Official Court Reporter
3-23-84

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE T. SCHMUCK,
Defendant.

FINAL PRETRIAL CONFERENCE ORDER

A final pretrial conference was held in this case on December 15, 1983, before United States District Judge Barbara B. Crabb. Plaintiff appeared by John Vaudreuil. Defendant appeared in person and by counsel, Harry Saltzburg. Also present was Peter Steinberg.

Counsel agreed to the voir dire questions in the form given to counsel at the conference.

Defendant's motion for the giving of an instruction on a lesser included offense was denied. Defendant's motion to let the jury decide whether the mailings in this case further the offense was granted. Defendant's motion to give his requested theory of defense instruction was denied on the ground that the proposed instruction did not incorporate a theory of defense.

Defendant noted that he opposed the government's request for the giving of an instruction on either joint venture or aiding and abetting and that he opposed the giving of an instruction on disagreement among jurors. A decision on the giving of an instruction either on joint

venture or aiding and abetting was reserved until the close of evidence in the trial. The defendant's objection to the giving of the instruction on disagreement among jurors was overruled.

Entered this 16th day of December, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WAYNE T. SCHMUCK,
Defendant.

STENOGRAPHIC TRANSCRIPT

of proceedings had upon Jury Trial in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable BARBARA B. CRABB, Judge, presiding, on Monday and Tuesday, the 19th and 20th days of December, 1983, commencing at 9:00 a.m. and 9:10 a.m., respectively.

APPEARANCES

The plaintiff appeared by JOHN W. VAUDREUIL, Assistant United States Attorney, Madison, Wisconsin.

The defendant, Wayne T. Schmuck, was present in person and by HARRY SALZBERG and PETER L. STEINBERG, Attorneys at Law, Salzberg & Steinberg, 108 King Street, Madison, Wisconsin.

• • • •

[113] THE COURT: All right. I will excuse the jurors for a few minutes. I'll send you back up to the jury room.

(Whereupon, the Jury was excused at 9:37 a.m.)

THE COURT: Mr. Salzberg.

MR. SALZBERG: Your Honor, I have here a motion for acquittal, a judgment of acquittal at the close of the

Government's case under Federal Rule 29(a). I briefed the motion and I'd like to present my brief to you, as well as a copy to the United States Attorney.

THE COURT: All right. Thank you. You can just hand it to the clerk. It might be easier.

Mr. Salzberg, I've had an opportunity to read your memorandum in support of your motion for judgment of acquittal and I will deny the motion. I understand the point that you are making and I'm familiar with the cases that you've cited. [114] I believe that it is not as clear as you indicate. That in *Galloway*, the Court of Appeals indicated there might be a different view of the situation were the title documents to require odometer readings. That was dicta in that case and I think it was an aside that the court made which does not mean that if odometers were required, the title documents would therefore be counterproductive to the scheme.

I think that the title documents have to be analyzed as the documents—that they were in fact analyzed in terms of what they did convey to the Department of Motor Vehicles.

I think it's—it's not at all clear that the title documents that do require odometer readings were counterproductive to the scheme because all that they showed was the odometer reading at the time the car was sold. They did not indicate a previous odometer reading which might have indicated that there had been a rollback or the possibility of a rollback.

This is still a matter that the Jury can decide. I believe a reasonable Jury could find it reasonable that under the view taken under the law in the *Galloway* case, the mailings in this case were in furtherance of the scheme to defraud.

MR. SALZBERG: Your Honor, one further ground for the motion for directed verdict which I haven't included in my brief and that is an issue of due process here. That my [115] client is entitled to notice of all conduct that's made criminal by the statute and on the

facts presented by the Government on this case, the statute covers such a wide range of activities that it would be impossible to determine what activity would be illegal and the statute, if it's applied to this case, I would say violates my client's due process right to notice that his conduct falls within the prohibitions of this statute, if the Government is applying the statute in the way that would deprive my client of what really is illegal.

THE COURT: The Government is applying the statute? Is that what you're saying?

MR. SALZBERG: Is enforcing the statute.

THE COURT: And what's the rest of your argument? In such a way that—

MR. SALZBERG: In such a way that an individual defendant would not know what conduct is illegal.

THE COURT: And you're saying that's because of the mailings to the State Department of Motor Vehicles?

MR. SALZBERG: Because—Well, I'm saying that because the—It's really hard to tell what conduct would be. The results of a mailing the Government will state really is furthering a mail fraud scheme under the statute and it's really unclear what the next case is going to be that the Government is saying is mail fraud under the statute.

[116] THE COURT: The motion will be denied on that ground as well. I don't think that it is so unclear to a defendant of the conduct that he would be charged with as to make it a violation of his due process rights. If the defendant could reasonably foresee that a mailing would take place, then he could be charged and convicted under the statute, assuming that the other elements are in that. The Jury could decide whether in this instance Mr. Schmuck could reasonably have foreseen that a mailing could have taken place.

Anything further before the jurors are brought down?

MR. VAUDREUIL: No, Your Honor.

THE COURT: And, Mr. Salzberg, your witnesses are here and ready to go?

MR. SALZBERG: Yes, Your Honor. There's only one witness.

THE COURT: Okay. Call the jurors, please.

MR. STEINBERG: Your Honor, I'll go get our witness.

THE COURT: Okay, fine.

(Whereupon, the proceedings were recommended in the presence of the Jury at 10:35 a.m., as follows:)

THE COURT: We are now beginning the defendant's case. Mr. Salzberg, you may begin by calling your first witness.

[117] MR. SALZBERG: I'd like to call my first witness, Mr. James Peterson.

THE COURT: Mr. Peterson, would you come forward, please?

JAMES PETERSON,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. SALZBERG:

Q Could you please state your name and spell it for the reporter?

A James Peterson. It's with an O-N.

Q And where do you live, Mr. Peterson?

A Cross Plains, Wisconsin.

Q And how are you employed?

A I'm employed by the Department of Transportation.

Q And how long have you had your present position with the Department of Transportation?

A About eleven years.

Q And could you briefly describe your duties in that position?

A Basically investigate complaints against motor vehicle dealers.

Q And do part of your duties relate to the detection and [118] investigation over odometer tampering?

A Yes.

Q And are you familiar with vehicle registration procedures in Wisconsin?

A Yes.

Q And are you familiar with the various forms that are required for registering a vehicle and changing a title on a motor vehicle in Wisconsin?

A Yes.

Q And does the information which is supposed to be reported on the forms a person uses to transfer a title in Wisconsin include the odometer reading of the car when it is transferred?

MR. VAUDREUIL: Your Honor, I'll object. I think —I think the evidence will be clear that it's changed considerably since 1979, 1980. Unless we's confining ourselves to that time period, I don't think it's really relevant.

THE COURT: All right. Would you confine your question to the period that is at issue in this case?

BY MR. SALZBERG:

Q Yes, Your Honor. Is there a place on the form to require the odometer mileage?

THE COURT: Which forms are you talking about? As they exist now or as they were in 1979?

[119] BY MR. SALZBERG:

Q The forms that were in use in 1979 and 1980?

A In '79 there was a place for an odometer reading on the Certificate of Title and also on a—a dealer reassignment form.

Q Thank you. And, do you know what the purpose in having the odometer reading on the forms w:s at that time?

A It was—On the title it was merely an indication to the purchaser what the mileage was. It was not a formal mileage statement.

Q And was one purpose of the requirement to—Was one purpose of the space for the odometer reading to help control odometer tampering?

A I don't know what their purpose was at that time when they put the space for the mileage on the title.

Q How long has there been the space on the forms to report the odometer reading?

A What form would you be referring to?

Q Any of the forms?

A The dealer reassignment form was changed about ten years ago to conform with the federal disclosure requirement and shortly after that, a space was provided on the Wisconsin title for mileage and later changed to include the formal disclosure statement.

Q And how long has it been a requirement in Wisconsin that [120] the odometer figure be reported when title is transferred on a vehicle?

A I think what you're asking is when was it necessary for any seller to give an odometer statement along with the applications and that—if that's your question, that would be September 1983.

Q Thank you. And does the Department of Transportation use computers to check for discrepancies in odometer statements?

THE COURT: Are you speaking of now or in 1979, '80?

MR. SALZBERG: Presently, Your Honor. Presently.

MR. VAUDREUIL: Then I'd object to relevancy, I don't think it makes any difference.

THE COURT: Sustained.

BY MR. SALZBERG:

Q How long have you investigated odometer tampering as part of your job duties?

A It would be shortly after the federal law was enacted. Nine or ten years I guess.

Q Thank you. And how significant is it in investigating odometer tampering to know the odometer reading of the car at various times during—various times during the use of the car?

A Well, anytime that you see odometer mileage on any form or statement, it helps in the investigation.

Q So knowing the odometer reading of the car at various [121] times in its history does assist in an odometer tampering investigation?

A Yes.

Q And isn't it critical to the investigation to know what the odometer reading was at various times in the car's history?

A Yes.

Q Now, do you know who investigated this case for the Department of Transportation?

A What particular phase of the investigation?

Q I was referring to the case against my client, Wayne T. Schmuck, who's present.

A The files were turned over to an investigator by the name of Ellswortl. Brooks who at the time lived in Tomah.

Q Thank you. And, is Mr. Brooks still working for the Department of Motor Vehicles?

A No. He is retired on a disability situation.

Q And do you know where Mr. Brooks is living at the present time?

A He's living in Tomah, Wisconsin.

Q And are you familiar from your duties with Mr. Brooks' investigation in this case?

A Yes.

Q And did Mr. Brooks use the Department of Transportation records to obtain the addresses of the owners of the cars [122] before Mr. Schmuck?

A Yes.

Q And what information did Mr. Brooks get from the prior owners? Did he get the—Well, I'll let you answer that one first.

MR. VAUDREUIL: I'm going to object, Your Honor.

THE COURT: As to what ground?

MR. VAUDREUIL: As to hearsay if he's going to be testifying as to what somebody might have said. I'm not sure what the question means, what he's getting at, but it might be calling for hearsay.

MR. SALZBERG: I'm not asking what Mr. Brooks said, Your Honor. I'm asking about the specific procedures of the odometer tampering investigation against my client.

THE COURT: Well, unless you ask them in a way that Mr. Peterson can answer of his own personal knowledge, it would be hearsay.

BY MR. SALZBERG:

Q Did Mr. Brooks obtain the prior odometer readings from the prior owners of the vehicles to your knowledge?

A Yes.

Q If Mr. Schmuck had sold these cars in Illinois instead of Wisconsin, would the Illinois title records contain any information about the odometer reading to your knowledge?

A At that time I don't believe that Illinois was recording [123] any odometer's mileage on their titles or required any statements to be given on the transfer of titles.

Q Thank you. Now even if the odometer figure isn't in the records, the odometer figure itself, aren't the records helpful to an investigation if they have the names and addresses of the previous owners on them?

A Yes.

Q Thank you. I have no further questions, Your Honor.

THE COURT: Mr. Vaudreuil, any cross-examination?

MR. VAUDREUIL: Yes, ma'am.

CROSS-EXAMINATION

BY MR. VAUDREUIL:

Q Mr. Peterson, you stated that you are familiar with the investigation of Mr. Schmuck as it began and came to a conclusion. Did that investigation start with a review of the Department of Motor Vehicles' records which tipped you off to some sort of fraud?

A No.

Q Isn't it a fact that that investigation started totally separate from any review of the records as a tip-off?

A Yes.

Q And how did it start?

A It started when we received complaints from individuals who had purchased cars which they had suspected of being tampered with.

[124] Q And once you received those complaints—Excuse me. What steps were then taken to see if there was an investigation, or anything should be done?

A We checked out the vehicle histories on those cars which led us to Illinois and then to the seller, Big Foot Auto Sales in Harvard, Illinois.

Q And was there anything particular about the number of titles you had in the Department of Motor Vehicles in the name of Big Foot that led you to think this might be something worth investigating?

A There was a large number of titles that they had applied for.

Q Now, isn't it a fact, Mr. Peterson, that if in fact just at random somebody had pulled the twelve title histories in this case, without any other knowledge, any other complaints, that nothing in those documents would tip off any fraud?

A No. There was—There was nothing in those files that would indicate any odometer tampering.

Q Because in fact in the occasions of those twelve where the title in Wisconsin was transmitted with an

odometer reading filled in, that would be the only—that is the only odometer reading in that car's history in Wisconsin, isn't it?

A Yes.

[125] Q How many cars, if you can estimate, Mr. Peterson, are titled by you folks in one year in Wisconsin

A Hundreds of thousands.

Q So in fact if the Department of Motor Vehicles were so inclined, it would be a night-and-day job probably to have somebody actually checking each of those title histories as a car comes in?

A Yes, sir.

Q And in fact, Mr. Peterson, isn't it correct, if somebody did do that and had done that for these twelve and the other hundreds of thousands, that those title histories wouldn't show any fraud by and large in almost every instance because they would be just like these twelve?

A That's true.

Q Now in terms of the necessity for these title documents to be obtained, in your experience and with your knowledge, isn't it correct that it's an absolute legal necessity to obtain title to your car when you purchase it and also it's a legal necessity for the title—excuse me—for the seller to give you a good title to that car?

A Yes.

MR. SALZBERG: Objection, Your Honor. I would say that's beyond the scope of the direct examination.

THE COURT: Overruled.

BY MR. VAUDREUIL:

[126] Q In fact, Mr. Peterson, isn't it correct that unless a person is inclined to violate the law, you couldn't drive a car without a title?

A That's right.

Q And in your experience in dealing with dealers' and customer complaints, isn't it in fact correct that if a dealer were to sell an automobile to a retail purchaser

and then not be able to provide title, that it's entirely likely that the purchaser would go back and get his money back and the dealer would look to get the car back to whoever he bought it from because he couldn't pass title?

A Yes.

Q Now, Mr. Peterson, assuming a person bought a car and had some suspicion that the mileage wasn't correct and did a personal check of the Department of Motor Vehicle records or asked you to check, isn't it in fact correct that checking those records again and, for example, and these twelve cars would not have revealed any fraud?

A That's correct.

Q And, in fact—well, strike that. Mr. Peterson, in your experience, what's the—maybe a percentage is putting it too fine, but in your estimation, how many Wisconsin automobile dealers use the mails in terms of their—at that time period used the mails for mailing in title documents?

A I would estimate more than half.

[127] Q And for dealers from the outlying parts of the state, northwestern Wisconsin, for example, would that percentage increase the further away you get from Madison?

A Yes, it would.

Q And is it your experience that a person who had a Wisconsin dealership would be aware that that's the common business practice?

A Yes.

Q I don't have any further questions.

THE COURT: Any redirect?

MR. SALZBERG: Yes. I have one question, Your Honor.

REDIRECT EXAMINATION

BY MR. SALZBERG:

Q Do you presently use computers to check for odometer tampering at the Department of Motor Vehicles now,

to check the large volume of cars? Given that you've said that you have a large volume of cars that are registered every year, do you use computers to check for odometer tampering when the need arises?

A Yes, we do now since we required the odometer mileage to be printed on the face of the Wisconsin title since September 12th of '83.

THE COURT: Since—

MR. SALZBERG: Thank you. I have no further [128] questions.

THE COURT: Since September 12th or December 12th?

THE WITNESS: September 12th.

MR. SALZBERG: Thank you. I have no further questions.

THE COURT: Mr. Vaudreuil, anything else?

MR. VAUDREUIL: Nothing. Thank you.

THE COURT: You may step down.

(Witness Peterson excused.)

MR. SALZBERG: The defense rests, Your Honor.

THE COURT: Mr. Vaudreuil, do you have any rebuttal?

MR. VAUDREUIL: No, Your Honor.

THE COURT: All right. Then I'll excuse the jurors for a short while while we have our instruction conference and I'll go back and get the materials for the instruction conference and be out in a few minutes. Court will recess for ten minutes.

• • • •

[132] MR. SALZBERG: There's one confusion here, Your Honor. I'm not sure which of the instructions you're referring to as the suggestions for instructions by the Government.

THE COURT: All right. It's the one that starts out, "In order to establish that Wayne T. Schmuck is guilty of . . ."

MR. SALZBERG: Yes. Okay.

THE COURT: Okay, and it's three pages long.

MR. SALZBERG: And it ends then with the United States Attorney's desire to have the instruction say that if you find that the—"If you further find that documents relating to these automobiles were thereafter mailed by the Wisconsin automobile dealers to the Wisconsin Department of Motor Vehicles, I instruct you, as a matter of law, that those mailings were in furtherance of the scheme to defraud."

THE COURT: Right.

MR. SALZBERG: Right. Okay. We would again voice our objection to the United States Attorney's instruction by saying that it is attempting to negate an important element of the offense.

THE COURT: I didn't mean to. That was a mistake on my part. The matter of law part should have been deleted. I would change that around.

[133] In order—That would be a new paragraph. In order to find the defendant guilty, you must find —This would be my proposal on that third page. In order to find the defendant guilty, you must find the defendant sold the automobiles described in the Indictment, knowing the odometers to have been altered, and that it was reasonably foreseeable that the documents would be mailed to the Department of Motor Vehicles and that documents relating to these automobiles were thereafter mailed by the Wisconsin automobile dealers to the Wisconsin Department of Motor Vehicles, and then there would be the last paragraph. The burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged.

I would also add, each separate use of the mails in furtherance of the scheme to defraud constitutes a separate offense.

MR. SALZBERG: Your Honor, between the two proposals, we would prefer the one that's written out on Pages—from the *Galloway* case, written out on what's marked as Pages 108 and the prior acts described on those pages. Howeyer, we state—we feel that our modi-

fied—what we call our modified proposed instruction we just submitted better states the elements of the offense and we think it's essential to have in the instructions that the defendant is not on trial for the offense of odometer [134] tampering because the Jury has heard so much evidence about the odometer tampering that we're afraid there may be an issue of prejudice and the Jury may very well convict my client of mail fraud because they find he's guilty of odometer tampering and they are two separate offenses and we feel it's very, very important that the Jury realize and then be instructed by the Court that my client is not on trial for odometer tampering and we also feel it's important that the Jury be instructed that they must find—

THE COURT: What about inserting on Page 109, after Line 18, the line, "The defendant is not on trial for the offense of odometer tampering," and then say—

MR. VAUDREUIL: Your Honor, may I be heard on that before it's finally decided?

THE COURT: Oh, sure. I'm just writing it down so I remember.

MR. VAUDREUIL: That would be after Line 18 on Page 109?

THE COURT: Right. All right. Mr. Vaudreuil, I'd like to hear what you have to say on whether the *Galloway* instruction or the Schmuck instruction should be used in this case and I'll refer to them that way just—

MR. VAUDREUIL: The Schmuck being—

THE COURT: The Schmuck being what you proposed in this case.

[135] MR. VAUDREUIL: Okay. I think actually I prefer the *Galloway*. What I was relying on was the Government's submission in *Galloway* and I think the Court effectively pared it down there and I think it would be more effective given the way the court gave it in *Galloway*. However, I would request—let me see—on Page 109 at the conclusion of—at Line 15. That's identical to what the Government submitted in the Schmuck in-

struction. It's—The second page at least, the way I have, with the deletion of it, it's not necessary for the Government to prove that, with the typo, Wayne T. Schmuck actually mailed the items is sufficient.

I think we can go on to say—I would just request that that—those two sentences be included there so that paragraph would—the third full paragraph on Page 109 where it ends up, the alleged fraud, at Line 15, would then go on to say, it is not necessary for the Government to prove that Wayne T. Schmuck actually mailed the items described. It's sufficient, if it's proved, that it's reasonably foreseeable that the mail be used in the course of the business transaction.

THE COURT: Well, look down at the paragraph at the beginning of Page 19 and see if that satisfies you.

MR. VAUDREUIL: Okay. I think—I think that will be okay. I think that will probably do it.

[136] THE COURT: What about the insertion of these two lines: The defendant is not on trial for the offense of odometer tampering. He's on trial for the offense of mail fraud, inserting that after Line 18 on Page 109?

MR. VAUDREUIL: I'd object to that, Your Honor, I guess as strenuously as I can. It's a thread that's running through the whole case obviously in terms of the theory of the offense. Whether that's a viable theory or not, but I think that the jurors here don't even know there is an offense of odometer tampering. They're not going to be instructed on it.

The evidence actually is probably equally based on the amount of time we spent in the last day on talking about rollbacks and talking about the mailings. The dealers and the customers and Mr. Peterson and the Department of Motor Vehicles people spent probably half of their time talking about the mailings both on direct and certainly all on cross. The only time that odometer tampering has ever been brought up as such is in—was in Mr. Salzberg's opening statement when he stated that his

client, you know, admits doing odometer tampering, but doesn't admit doing mail fraud.

I think it's really a dangerous, risky business to start instructing them what the defendant isn't on trial for. I think the proper instruction would be to tell them what he is on trial for and what must be proven and then the proper [137] argument under that is to say that my client, in terms of the defendant, Mr. Schmuck is not guilty of mail fraud because. I don't think it's really permissible argument and I don't think it's—I think it's really risky to instruct the jurors on offenses that they shouldn't find him guilty of.

I don't think—I think what we risk is confusing them getting somebody going up there and saying, well, gee, maybe there is an odometer tampering crime here. What's that? They've been talking about it an awful lot and at the very least you probobly risk getting a hung jury or inviting a hung jury perhaps. I just don't think it's necessary given the evidence.

It's really—What it really is is a back door, lesser-included, giving the jurors with no out. They aren't being given a lesser-included instruction and I think that's appropriate that it not be given and they're going to be at least told a little bit about this crime, this other crime with really no idea how it fits in here.

I don't intend to argue—I intend to argue the two elements of mail fraud and one being a scheme to defraud involving the odometers. The other having the equation the mailings and the two components there, the causation and the in furtherance of.

I think the appropriate argument, given the instructions, would be that, from the defendant's point of view, is [138] only the argument that the second half of the mail fraud component isn't met and my man's not guilty. I just don't think it's appropriate—well, I don't need to repeat it and I do object to that.

THE COURT: Mr. Salzberg.

MR. SALZBERG: Yes. The United States Attorney stated there was no testimony except the testimony which he related to the odometer tampering, but didn't the FBI agent testify that he was investigating an odometer tampering scheme in addition to mail fraud and that my client, Mr. Schmuck, knew that odometer tampering was a federal crime? I think it's—Again, I would reiterate I feel it's essential that the Jury be instructed, given the testimony by the witnesses, that it's not an odometer tampering trial. That the defendant is not on trial for odometer tampering.

Certainly the witnesses—the Jury has heard from all the witnesses testimony relating to cars whose odometers were turned back and although the phrase "odometer tampering" may or may not have been used by every witness, it's certainly been an underlying—an underlying theme that the Jury has absorbed throughout this trial and the U.S. Attorney I feel is attempting to use the prejudice that the jurors may feel against odometer tampering in its favor, which I would react to by again reiterating the need for the Jury to know that it's not an odometer tampering trial.

[139] The COURT: I'm not going to insert the statements that you asked for, Mr. Salzberg. I think the jurors are going to have to find the two essential elements according to the instructions I've given them. That's the crime that they are supposed to be considering and that's what they are going to have to base their decision on and you can argue the point that you're making, but I'm not going to instruct them that way.

About 308, which is proof of other crimes or acts, the jurors will be instructed they've heard evidence of acts of the defendant other than those charged in the Indictment. You may consider this evidence only on the question of what? What is the point? Is it absence of mistake? Is it intent? Is it motive? Is it plan?

MR. VAUDREUIL: It's got to be some of those. Let me see here. I think it would be motive, Your Honor.

I think it would be motive; perhaps intent; certainly plan and knowledge.

I don't really think absence of mistake—I think motive, intent, plan and knowledge for these reasons. It would be —It's certainly part of the theory of the case that this was a continuing operation and I think those go to that, that continuing operation, and Mr. Schmuck's motive to continue to have the operation work, thus having the titles be proper and things all go just smoothly. So, I think the [140] evidence of the other cars goes to those—to those thoughts or those directions, I guess; motive, intent.

THE COURT: I hate to put all four of those in. That sounds like we're really loading it up.

MR. VAUDREUIL: Motive and intent are really kind of the same I guess. We can say knowledge and plan.

THE COURT: Mr. Salzberg, what comments do you have on that?

MR. SALZBERG: We would object to both the evidence and the instruction on grounds that they are prejudicial.

THE COURT: Well, since I've overruled the objection as it relates to the evidence that I am going to give the instruction—well, I take that back. If you would prefer that I give no instruction at all, I think that's the defendant's prerogative.

MR. SALZBERG: No instruction at all vis-à-vis which issue, Your Honor?

THE COURT: Well, what I was planning to do was to give a restricting instruction. That is, that you can consider evidence of prior acts of the defendant, other than those charged in the Indictment, only on the question of, and specify what it—what aspects it could be considered for. If I don't give the instruction, the jurors are free to consider that evidence for any purpose that they want. So, I think it's an instruction that's favorable

to the [141] defendant. If the defendant chooses not to have it given, I would not give it.

MR. SALZBERG: Okay, Your Honor. I just want to discuss it with my partner for a minute.

(Whereupon, a conversation was had off the record between Attorney Salzberg and Attorney Steinberg.)

MR. SALZBERG: We would oppose the instruction altogether, Your Honor.

THE COURT: All right. Mr. Vaudreuil, do you wish to say anything more about that?

MR. VAUDREUIL: No, Your Honor.

THE COURT: Okay.

MR. VAUDREUIL: I would assume that I'm still allowed to argue this—argue that?

THE COURT: Yes, you are. Okay. Anything else before I take these back to get them ready for the Jury?

MR. VAUDREUIL: Your Honor, maybe I'm just not clear.

THE COURT: Oh, aiding and abetting. We have that problem.

MR. VAUDREUIL: Perhaps I can address—There's one other issue. In terms of the Schmuck instructions, as I call them, the paragraph as you rewrote it, taking out the instructing as a matter of law, the Court does intend to give that or does not intend to give that?

[142] THE COURT: No. I do not intend to give that.

MR. VAUDREUIL: Even as rewritten?

THE COURT: Right. That was an alternative.

MR. VAUDREUIL: Okay. I guess I'd request that it be given, but I can—If that's the Court's ruling, I have no further argument really.

THE COURT: Okay.

MR. SALZBERG: Just the aiding and abetting issue then.

THE COURT: Okay. I don't really see—I don't really see why either of those are necessary because I

think it's covered by the instructions on the elements of mail fraud.

MR. VAUDREUIL: I think that's correct, Your Honor. I think we made it clear in the instructions now as drafted that Mr. Schmuck doesn't need a mailman, doesn't need to do those kinds of things, so I guess I'd withdraw them, if that's necessary.

THE COURT: Do you have any objection?

MR. SALZBERG: No objection.

THE COURT: All right. I'll recess court then for ten minutes and we'll resume for closing arguments.

MR. VAUDREUIL: Your Honor?

MR. SALZBERG: Your Honor?

THE COURT: I guess not. I'll try again. [143] Mr. Vaudreuil.

MR. VAUDREUIL: There's two items that I wanted to cover before closing. First of all, does the Court intend to give a copy of the Indictment to the jurors or to pass it among them and let them read it and not take it to the jury room? I'm not sure which one you'll do in this case.

THE COURT: What I would ordinarily do is give them a copy of the Indictment with the instructions to take to the jury room with them.

MR. VAUDREUIL: Okay, because I wanted to know if, from closing, I'm not going to tell them you'll have the instructions with them. I know that's not preferable, but I think I would want to tell them you'll have the Indictment. You'll be able to go off count by count and look at the cars.

THE COURT: Right. That's right.

MR. VAUDREUIL: The second issue I wanted to raise really goes to what we were talking about in terms of the odometer tampering and the reference to odometer tampering and I want to get this clear so I don't have to object, or make my objections known now. I think, given what Mr. Salzberg submitted as a theory of the defense, which isn't going to be given I realize, and given

his opening statement, I at least assume that part of his closing argument would be basically to that effect that the client has not done odometer tampering or has done odometer tampering, but [144] Mr. Schmuck hasn't done mail fraud and these are the reasons and that's something I object to for basically the same reasons I objected in opening statement.

I think anytime, for the same reasons I talked about in the instruction, I guess. I think it hints to the Jury of some lesser-included that doen't exist in this case. It leads to confusion I think.

I think it's permissible and proper to argue that Mr. Schmuck hasn't done this crime, ladies and gentlemen, because there's two elements to prove and the second one hasn't been proven, that the mailings aren't in furtherance for these reasons and they would lead to detection or whatever.

I don't think it's appropriate to argue to the Jury that Mr. Schmuck is guilty of rolling back the odometers. Perhaps it's proper—I guess it would be proper to say he rolled back the odometers, but it isn't a mail fraud because this is what happened.

THE COURT: Wait. It would not be proper?

MR. VAUDREUIL: What I would object to is the specific reference of him being guilty of another crime. In trying to give a little leeway, it seems that it would be proper perhaps to argue that Mr. Schmuck rolled these cars back, but there's two elements to mail fraud and this second element hasn't been proven and therefore you should find him [145] not guilty.

THE COURT: What you're objecting to is an argument in which Mr. Salzberg says the Government charged him with the wrong crime?

MR. VAUDREUIL: In so many words, although I realize Mr. Salzberg wouldn't say it that way, but I think when you say he's guilty of another crime, using the words he's guilty of something else leaves that implication without a doubt.

THE COURT: Do you—Let me see if I understand what you are saying to me. You would not object if Mr. Salzberg said Mr. Schmuck has admitted he rolled back the odometers. That's not an issue in the case. There's no dispute about that.

There is a dispute about whether his conduct met the elements of mail fraud which is what he's charged with and you jurors have to decide whether those elements have been met and those elements are such and such.

MR. VAUDREUIL: That I think would be appropriate.

THE COURT: But your basic dispute is over Mr. Salzberg using the words, sure, he's guilty of odometer tampering, but he's not guilty of mail fraud?

MR. VAUDREUIL: Telling them that there is another crime that he is guilty of. I think the way the Court stated it is the appropriate way, to basically concede one [146] element. I realize—I think that's the appropriate way to go with it and I don't think it's appropriate and I think it leads to some problems if it's done the other way.

THE COURT: Mr. Salzberg, do you have any comment on that?

MR. SALZBERG: I think the attorney is attempting to restrict the contents of my closing argument. I'm not sure what authority he has for restricting it. I think he's attempting to use the Jury. He's attempting to prejudice the Jury naturally as much as possible in his favor, but I feel as you already stated that I—you already implied that I can say, Your Honor, that my client is not on trial for odometer tampering and I think it's in the record that he's—

THE COURT: Okay. That's okay.

MR. SALZBERG: Right.

THE COURT: But don't say he's guilty of odometer tampering.

MR. SALZBERG: I will not say he's guilty of odometer tampering.

THE COURT: Okay, and I would—I would object or find it objectionable if you—if the thrust of your argument were directed to the Government's having chosen the wrong crime to charge him with either, explicitly or implicitly.

MR. SALZBERG: No, I won't. I won't use that argument either, Your Honor, but I think it's on the record [147] that my client admitted to turning back odometers, to odometer tampering activities and I think it's perfectly appropriate for me to use this in my closing argument to rebut the prejudice against my client which no doubt certain members of the Jury may feel and I think it's a perfectly legitimate strategy for me to use in closing argument.

THE COURT: All right. With that understanding that you won't talk about his guilt of that?

MR. SALZBERG: I will not talk of his guilt of it.

* * * *

[200] THE COURT: Counsel, is there anything you wish to take up outside the presence of the Jury?

MR. SALZBERG: Yes, Your Honor. I'd like to renew my motion for judgment of acquittal under Rule 29(a).

THE COURT: That motion is denied.

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Maureen Beilke
Official Court Reporter
Date 4-9-84

I certifiy that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Nancy Schell
Official Court Reporter
Date 4-9-84

I certifiy that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kim K. Leeitz
Official Court Reporter
Date 4-9-84

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK
Defendant.

MOTION FOR JUDGEMENT OF ACQUITTAL AT CLOSE OF GOVERNMENT'S CASE UNDER FRCrP 29(a)

Defendant Wayne Schmuck, by his attorney hereby moves the Court for judgement of acquittal of the offenses charged in the indictment herein, on the grounds that the evidence introduced by the United States is insufficient to sustain a conviction of such offenses.

This motion is based on the annexed Memorandum and all the files and records in this case.

Dated:

Respectfully submitted,

HARRY SALZBERG
Attorney for defendant
108 King Street
Madison, WI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGEMENT OF ACQUITTAL

(I) UPON EVIDENCE SUBMITTED BY THE GOVERNMENT, A REASONABLY MINDED JURY MUST HAVE A REASONABLE DOUBT AS TO WHETHER THE MAILINGS CAUSED BY THE DEFENDANT WERE FOR THE PURPOSE OF EXECUTING THE FRAUDULENT SCHEME, AND THEREFORE THE COURT SHOULD GRANT A MOTION FOR ACQUITTAL PURSUANT TO FRCrP 29 (a)

(A) UNLIKE THE MAILINGS AT ISSUE IN *UNITED STATES V. GALLOWAY*, 664 F2d 161, MOST ALL THE MAILINGS WHICH ARE THE SUBJECT OF THIS INDICTMENT CONSIST OF DOCUMENTS SPECIFICALLY REQUIRING AND CONTAINING ODOMETER READINGS, THEREBY MAKING DETECTION OF THE DEFENDANT'S SCHEME MORE LIKELY, AND RAISING GREAT DOUBT AS TO WHETHER THESE MAILINGS FURTHERED THE DEFENDANT'S ALLEGED FRAUDULENT SCHEME.

In *United States v. Maze*, 414 U.S. 395, the United States Supreme Court held that in order to prove mail fraud the government must demonstrate that the mailings at issue are sufficiently closely related to the defendant's scheme to bring it within the mail fraud statute, 414 U.S. at 399. The statute does not reach all mailings resulting from the fraudulent scheme, but only those mailings which are in furtherance of the scheme, 414 U.S. at 405. The Supreme Court emphasized that because the mailings endangered the scheme by increasing the likelihood of its detection, the mailings could not fairly be said to be in furtherance of the scheme, 414 U.S. 403. The Court aptly noted that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice.'" 414 U.S. at 405.

In *United States v. Galloway*, 664 F2d 161, the Seventh Circuit Court of Appeals applied the Supreme Court's reasoning in *Maze* to an odometer roll-back scheme and held that the title application mailings did indeed occur for the purpose of executing the scheme. However, essential to the Appellate Panel's reversal of this Court's directed verdict for the defendant was the view that given the facts in *Galloway*, the mailings "were not counterproductive to the scheme, as were the mailings in *Maze*" *Id.* 664 F2d at 163, which endangered Maze's scheme by furthering the likelihood of detection. The Court noted in this regard that "nowhere on the title document were odometer readings required. Such a requirement, of course, might have made detection of the scheme more likely." *U.S. v. Galloway*, 664 F2d 161 note 7.

This case is thus amply distinguishable from *Galloway* since the mailed documents which constitute the alleged mail fraud counts in this case not only require an odome-

ter reading, but in almost every instance contain an explicit indication of the rolled back odometer figure. Given these facts the mailings are clearly counterproductive to the fraudulent scheme and, as the *Galloway* Court notes, make a detection of the scheme more likely. Since the mailings in this case endanger rather than further the scheme, the *Maze* ruling precludes these mailings from forming the basis of a mail fraud conviction.

The majority opinion in *Galloway* asserts that in *U.S. v. Shryock*, 537 F2d 207, the Fifth Circuit Court of Appeals upheld a mail fraud conviction where the documents included, as here, an indication of the odometer reading. However, in *Shryock*, the defendant was more closely involved with the fraudulent mailings since the defendant's employees had hand delivered the title applications directly to the state transportation authorities, 537 F2d at 209. But in this case the defendant was not a party to the transaction affecting the title transfer, that is, the mailings of the title applications from the retail dealer purchasers to the state transportation authorities. Here, the mailings occured after the scheme was completed—after the defendant had received the proceeds from the sale of the cars with rolled odometers, and the cars had been resold to a retail purchaser. The success of the scheme here in no way depended upon how the transfer of the title was completed.

The mailings which are the subject of the 12 count indictment against Wayne Schmuck are therefore "routine mailings themselves intrinsically innocent" which are not sufficiently related to the fraudulent scheme. *United States v. Tarnopol*, 561 F2d 466, cited in *United States v. Galloway* diss op. The mailings in no way helped to conceal the scheme. On the contrary the rolled back odometer readings on the face of the documents vastly increased the chances for detection of the scheme.

For the above stated reasons the government has presented evidence which would raise considerable doubt in

the minds of reasonable jurors that the mailings at issue were in furtherance of the fraudulent scheme, an essential element of the offense. The Court should grant a motion for acquittal pursuant FRCrP 29(a). See *U.S. v. Marable*, 574 F 2d 224.

Respectfully submitted,

HARRY SALZBERG
Attorney for Defendant
108 King Street
Madison, WI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE SCHMUCK,
Defendant.

ORDER

Defendant has moved for a judgment of acquittal or, in the alternative, for a new trial. In support of the motion defendant contends that it was error to fail to instruct the jury on the lesser-included offense of odometer tampering and to allow in evidence of odometer tampering on cars other than those charged in the indictment. Also defendant contends that in prosecuting this case as a mail fraud which is a felony rather than as odometer tampering which is a misdemeanor, the United States Attorney has usurped the function of Congress.

For the reasons stated on the record during the course of the trial and in the pretrial proceedings, I find no merit in the first two grounds raised by defendant. The third ground, raised here for the first time, is unpersuasive. The Court of Appeals for the Seventh Circuit has upheld convictions for mail fraud on the same set of facts, *see United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981). Moreover, there is nothing in the mail fraud statute that prevents a prosecutor from using it against persons who benefit from the use of the mails to further their odometer tampering schemes. The fact that Con-

gress has made the act of odometer tampering a federal crime does not mean that Congress did not believe the use of the mails to carry out a whole scheme to defraud by odometer tampering cannot also be a federal crime. The focus in the first instance is upon the tampering itself; in the second instance, it is upon the criminal use of the mails.

ORDER

IT IS ORDERED that defendant's motion for acquittal or, in the alternative, for a new trial, is DENIED.

Entered this 29th day of December, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK

Defendant.

[Filed Dec. 27, 1983]

MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now defendant Wayne T. Schmuck, by and through his attorney, Harry E. Salzberg, pursuant to Rule 29 (c) and Rule 33 of the Rules of Criminal Procedure, and respectfully moves this Honorable Court as follows:

1. That the Court grant defendant's motion for a judgment of acquittal, which was made after the close of the government's evidence, and orally renewed after the return of the jury verdict, for the grounds stated therein;

2. Alternatively, grant defendant a new trial in the interests of justice. As grounds for this motion, defendant alleges:

A. It was error for the Court to refuse defendant's requested jury instruction on the lesser included offense of

odometer tampering, as well as the requested instruction admonishing the jury that the defendant was not on trial for odometer tampering, and defendant's requested instruction on the theory of the defense, both in its original form and as modified. The consequence of failing to instruct the jury in this regard was that the government could count on jury hostility to odometer tampering to lower the government's burden of proof, and convict the defendant of mail fraud in a weak case, rather than let the defendant go without some conviction.

B. It was error for the Court to admit evidence of other conduct of the defendant, i.e. the total number of cars defendant tampered with during a 3 year period, and evidence from the ultimate purchasers of the cars named in the indictment of their purchase and subsequent experience with the cars, since this evidence served only to appeal to the juror's sympathies and prejudices, and was not necessary to the government's proof.

C. The tenor of the government's argument in this case is so far reaching that any incident of odometer tampering can be prosecuted as mail fraud. The controls imposed in every state over the transfers of automobile titles, which exist for the purpose of hindering crimes connected with the use and transfer of automobiles, practically guarantee that at some point after the automobile leaves the defendant's hands, a mailing of title documents will occur. Thus, the regulatory framework becomes the means of enhancing the odium and the punishment of defendant's wrongdoing. But fixing the level of seriousness of a crime, and the appropriate punishment, is a legislative function, not an executive one. When Congress has not seen fit to make odometer tampering a felony, even though raising the potential fine to $50,000.00, the government prosecutor usurps the legislative function by prosecuting odometer tampering as mail fraud.

Until the people's elected representatives declare that certain conduct is felonious, the principles of democratic government and separation of powers should prevent the prosecutor's usurpation of this decision under the guise of prosecutorial discretion.

D. Defendant has been deprived by these errors of his rights be secure against unreasonable seizure of his person, to have due process of law in a criminal prosecution, to have an impartial jury and the effective assistance of counsel, and not to have excessive, cruel, or unusual punishment imposed upon him, which rights are secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3. This motion is based upon the entire records, files, and proceedings in this case and the authorities cited therein.

4. For the foregoing reasons the defendant should be acquitted by the Court or granted a new trial.

Dated: Madison, Wisconsin, December 27, 1983

Respectfully submitted,

/s/ Peter L. Steinberg for
HARRY E. SALZBERG
Attorney for Wayne T. Schmuck

108 King Street
Madison, Wisconsin 53703

(608) 256-4771

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF WISCONSIN

Docket No. 83-CR-56-C

UNITED STATES OF AMERICA

vs.

WAYNE T. SCHMUCK

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date February 24, 1984.

☒ With Counsel Harry Salzberg

☐ Guilty, and the court being satisfied that there is a factual basis for the plea.

☐ Nolo Contendere,

☒ Not Guilty

There being a verdict of

☐ Not Guilty. Defendant is discharged

☒ Guilty.

Defendant has been convicted as charged of the offense(s) of frauds and swindles, in violation of Title 18, U.S.C. § 1341, and fictitious name or address, U.S. Postal Service, in violation of Title 18, U.S.C. § 1342.

The court asked whether defendant had anything to say why judgment should not be pronounced because no sufficient cause to the contrary was shown or appeared

to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 90 days on Count I. It is recommended that work release privileges not be granted during the period of confinement.

As to each of Counts II through XII, it is adjudged that the defendant pay a fine to the United States of $50 and the imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of four (4) years, upon the terms and conditions of the court set forth in Appendix A, attached hereto; said probation on each count to run concurrently; said period of probation to commence upon release from physical custody on Count I of the Indictment. The fines are to be paid within six (6) months of the termination of the probation period.

It is ordered that execution of the sentence is stayed pending the outcome of the appeal in this case. The present conditions of release are continued pending appeal.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

/s/ Barbara B. Crabb
U.S. District Judge

February 24, 1984

APPENDIX A TO JUDGMENT AND PROBATION/COMMITMENT ORDER

The defendant is placed on probation for a period of *Four (4) year* upon the following terms and conditions:

(1) Defendant shall refrain from violation of any law (federal, state, and local), and shall get in touch immediately with defendant's Probation Officer if arrested or questioned by a law enforcement officer.

(2) Defendant shall associate only with law-abiding persons and maintain reasonable hours.

(3) Defendant shall work regularly at a lawful occupation and support defendant's legal dependents, if any, to the best of defendant's ability. When out of work defendant shall notify defendant's probation officer at once. Defendant shall consult defendant's probation officer prior to job changes.

(4) Defendant shall not leave the judicial district without permission of the probation officer.

(5) Defendant shall notify defendant's probation officer immediately of any change in place of residence.

(6) Defendant shall follow the probation officer's instructions and advice.

(7) Defendant shall report to the probation officer as directed.

(8) If the offense of which defendant has been convicted in this case is punishable by imprisonment for a term exceeding one year, or if the defendant has ever been convicted in any federal court or in any court of any state or in any

court of any political subdivision of any state of an offense punishable by imprisonment for a term exceeding one year, then the defendant shall not receive, possess, or transport in commerce or affecting commerce any firearm, as defined in 18 U.S.C. § 921(a)(3), including any hand gun, rifle, or shotgun.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRUCIT

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 CR 56—Barbara B. Crabb, *Judge.*

Argued September 13, 1984—Decided November 12, 1985

Before FLAUM, *Circuit Judge*, and SWYGERT and FAIRCHILD, *Senior Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* Defendant Wayne T. Schmuck appeals from his conviction of twelve counts of mail fraud, 18 U.S.C. § 1341 (1982). Because the defendant was improperly denied an instruction on a lesser included offense, we reverse and remand for a new trial.

The defendant concedes that he willfully rolled back odometers in order to sell used cars for inflated prices, a federal misdemeanor. 15 U.S.C. §§ 1984, 1990c(a) (1982). Nevertheless, he was indicted of mail fraud only,

a felony, and the district court denied his request that the jury be instructed on the odometer tampering offense as a lesser included offense of mail fraud.

The mail fraud statute requires a scheme to defraud and some mailing in furtherance of that scheme. According to the indictment and evidence at trial, the underlying scheme to defraud was the defendant's admitted odometer tampering. As for the mailing requirement, it is undisputed that the defendant did not personally use the mails to further his scheme. Rather, the unwitting retailers to whom the defendant sold the cars mailed forms, pursuant to the prevailing practice in Wisconsin, to the Secretary of State that included, *inter alia*, the defendant's fraudulent odometer readings. These forms were necessary to obtain a certificate of title. Without such a certificate, the cars were not marketable to the ultimate consumers.

I

The defendant urges outright reversal of his convictions on two grounds that can be dismissed summarily. First, he argues that no rational trier of fact could find that he used the mails in furtherance of his odometer-tampering fraud. In *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), we held that a rational trier of fact could convict on a mail fraud charge arising from a virtually identical odometer tampering scheme that also entailed the same mailings of forms by third-party retailers. We refuse to overrule that decision.

Second, defendant, contends that due process prohibits a mail fraud conviction based on a routine mailing by a third party that the defendant has no power to prevent. One answer is that he can prevent the mailing by abstaining from the fraud. In any event, this court in *Galloway*, 664 F.2d at 161, perceived no due process impediment to holding the same type of mailing a predicate for a mail fraud conviction. Nor did the Supreme Court

when it said that a person causes the mails to be used if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen" even though use of the mails was not actually intended. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

Defendant argues that his convictions violated due process in still another respect because the mail fraud statute does not give fair warning that a fraud which causes a mailing in the manner present here is a violation of the statute. Regardless of what the defendant or any reasonable person might conclude upon reading the mail fraud statute in isolation, the expansive judicial interpretations of the language, going back many years, must be considered with the text, and leave no doubt that a fraud that foreseeably causes a mailing under the present circumstances is an offense.

II

The defendant also urges several grounds for a reversal and remand for a new trial. We need only each the lesser included offense issue.

Defendant moved in advance of trial for an instruction that would have permitted the jury to find him guilty of odometer tampering. He was entitled to such an instruction if, under these facts, odometer tampering can properly be considered a lesser included offense of mail fraud and if a rational juror could have found him innocent of mail fraud but guilty of odometer tampering. *See* Fed.R.Crim.P. 31(c); *Keeble v. United States*, 412 U.S. 205, 208 (1973).

We find that under these facts odometer tampering is a lesser included offense of mail fraud. It is possible, of course, to commit mail fraud without altering odometers. Apart from the mailing element, the mail fraud statute requires only some "scheme" to defraud. 18 U.S.C.

§ 1341. The scheme need not concern odometers, and even if it does, it need not be completed. The offense of odometer tampering, on the other hand, is necessarily concerned with odometers, and the tampering must be completed to be punishable under 15 U.S.C. §§ 1984, 1990c(a). This theoretical possibility of committing the greater offense without committing the lesser offense would be dispositive under the traditional definition of a lesser included offense; the lesser offense would lack the requisite identity of statutory elements with the greater offense. Two circuits continue to follow this traditional definition. *See United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3d Cir. 1977).

This circuit, however, does not follow the traditional definition. Rather than focus on theoretical possibilities, we look to the facts as alleged in the indictment and as proven at trial to determine whether the prosecution relied on proof of all the elements of the lesser offense to prove, in turn, guilt of the greater offense. *See United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *accord United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir. 1983); *United States v. Johnson*, 637 F.2d 1224, 1238-39 (9th Cir. 1980); *United States v. Whitaker*, 447 F.2d 314, 319 (D.C. Cir. 1971). Thus, it is beside the point that a scheme to defraud *could* have been sufficiently established without proof of all the statutory elements of odometer tampering. What matters is that according to the prosecution's theory of the case, as expressed in the indictment and at trial, the defendant did intentionally cause odometers to be rolled back,[1] thereby satisfying all the elements of the odometer tampering statute.

[1] The prosecution argues that odometer tampering requires a greater degree of specific intent than does mail fraud because the former offense contains the additional element of "wilfulness." This court has recently held that the mental state required by 15 U.S.C. § 1990c is simply intent to commit the prohibited act; the "knowingly and wilfully" language "means exactly what it says rather than contain[s] a hidden requirement." *United States v. Ellis*, 739 F.2d 1250 (7th Cir. 1984). Thus, to be convicted of odometer tampering, the defendant need only intend to roll back odometers. Indeed, because it is not even necessary to show an additional intent to defraud others thereby, the odometer tampering statute actually requires a lesser showing of intent than does the mail fraud statute. *See id.*

To be sure, this more flexible definition of a lesser included offense carries with it the potential for abuse. The defendant might confuse the jury by securing instructions on a myriad of crimes only tangentially related to the one charged; as a result, the jury may feel pressured to return a compromise verdict even though it would otherwise be included to convict the defendant of the greater offense charged. We therefore join the District of Columbia Circuit in requiring the defendant, when requesting a lesser included instruction, to show some "inherent relationship" between the lesser offense proved and the greater offense charged. *See Whitaker*, 447 F.2d at 319.

An "inherent relationship" exists where the two offenses relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense. *Id.* If such is the case, there is little chance that the jury will be confused by the lesser included instruction. Rather, the instruction will alert the jury to its duty to decide not simply whether the defendant is guilty, but what he is guilty of. Where there is such an inherent relationship, the two offenses can properly be viewed as simply two different degrees of the same general crime, and the instruction informs the jury that different degrees of culpability can be ascribed to the defendant's wrongful conduct.

We hold that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud

offense. Both offenses protect against the same kind of societal wrong: fraud. And it can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. *See supra* at 3-4; *cf. Whitaker*, 447 F.2d at 319 (generally, though not invariably, proofs must overlap). Moreover, it is difficult to see how an instruction on the underlying fraud will confuse the jury. Congress has deemed fraud that is perpetrated through the mails to be an especially serious offense, punishable as a felony by as much as five years in jail for each mailing. But a misdemeanor fraud, such as odometer tampering, is deemed less threatening to society and carries a lesser penalty. An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

Having found odometer tampering to be a lesser included offense of mail fraud, we turn to the second requirement that must be satisfied in order to be entitled to an instruction on the lesser offense: that a rational trier of fact could have found the defendant innocent of the greater offense, but guilty of the lesser offense. *See Keeble*, 412 U.S. at 208; *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). The reason for this requirement is to ensure that the instruction is not "merely a device for defendant to invoke the mercy-dispensing prerogative of the jury."[2] *United States v.*

[2] On the other hand, we do not presume to eliminate jury equity; a judge cannot direct a verdict of guilty no matter how strong the evidence. It is proper, however, for the judge to discourage verdicts that disregard—whether intentionally or not—the evidence. As Judge Leventhal pointed out in *Sinclair*, 444 F.2d at 890:

> While a judge cannot eliminate the prerogative a jury retains to disregard his instruction and to acquit on the basis of conjecture rather than reason, the judge is not required to put the case to the jury on a basis that essentially indulges and even encourages speculations as to bizarre reconstructions [of the evidence].

Sinclair, 444 F.2d 888, 890 (D.C. Cir. 1971); *accord Medina*, 755 F.2d at 1273; *United States v. Busic*, 592 F.2d 13, 24-25 (3d Cir. 1978). And in a larger sense, this requirement prevents the judge and jury from encroaching on the other's domain. The jury resolves factual issues only; the judge decides the law. To be sure, the jury's decision to convict on the lesser rather than the greater offense should and does indirectly affect the defendant's ultimate punishment, an issue of law. But the jury makes such a decision only because it finds a factual element of the greater offense lacking; it cannot invade the province of the judge by deciding as a matter of law that, regardless of the facts, conviction of the lesser offense and the attendant lesser punishment are more appropriate.[3] On the other hand, in deciding what a rational juror can and cannot conclude from the evidence, the court should be wary of invading the exclusive factfinding prerogatives of the jury.

As the literal terms of the test indicate, the courts will rarely deem a potential jury finding "irrational." This is in keeping with the policies that underlie the test: the object is merely to discourage the jury from rendering mercy verdicts without invading the jury's province as the ultimate finder of fact. In general, the courts will find irrationality only where the theory of the defense is logically inconsistent with a guilty verdict on the lesser offense or where evidence of such guilt is so slight as not to raise a jury question on the issue. In the first instance, the danger of encouraging jury misconduct is obvious. An illogical verdict is by definition irrational and is probably motivated by factors extrinsic to the evidence at trial—i.e., a desire to render a mercy verdict.

[3] *But see supra* note 2.

Thus, if a defendant in a murder prosecution relies on an alibi defense, he can hardly ask the jury, in the alternative, to convict him of a lesser degree of homicide. Either he is guilty of murder or completely innocent; any other verdict would be an illogical compromise verdict. In such a case, the defendant is not entitled to a lesser included instruction. *E.g., Briley v. Bass*, 742 F.2d 155, 164-65 (4th Cir. 1984).

In the second instance, the courts will refuse to give the lesser instruction not because a verdict of guilty would be illogical or wholly unsupported by the evidence, but because the evidence to sustain the verdict is simply too thin to persuade a rational juror. *See, e.g., Medina*, 755 F.2d at 1273 n.2; *Busic*, 592 F.2d at 24-25; *Sinclair*, 444 F.2d at 890. Yet if a rational juror should be expected to return verdicts that are plausible as well as merely logical or merely supported by some scintilla of evidence in the record, courts must take care to allow jurors to choose from a broad range of plausible verdicts. Thus, the courts draw all inferences in favor of finding the potential verdict rational. *See Sinclair*, 444 F.2d at 890. Where the verdict would require a bizarre or overly imaginative reconstruction of events, the verdict is irrational. *See id.* The classic example is where a defendant is found in possession of more than a ton of marijuana and is charged with possession with intent to distribute. Although it is possible that the defendant had no intent to distribute, such a possibility is so improbable that an instruction on the lesser offense of simple possession is proper. *E.g., United States v. Silla*, 555 F.2d 703, 706-07 (9th Cir. 1977).

Turning to the case at bar, an acquittal of mail fraud would have been logically consistent with a conviction of odometer tampering. Such a verdict would follow from a finding that the mailings were not sufficiently in furtherance of the underlying fraud to justify a mail fraud conviction.

As for the requirement that the verdict be rational and plausible as well as logical, such a conclusion of the mailings issue would have been substantially supported by the record evidence. This is not a case where the defendant presented little or no evidence on point. *Cf. Busic*, 592 F.2d at 25 (it is not enough that the defendant formally contested the existence of the additional element distinguishing the greater offense from the lesser; "[t]he contest must be real"). Indeed, the defendant rested his entire defense on the theory that the mailings element was lacking. The jury could have rationally and plausibly concluded that mailings by third-party retailers who were not under the control of the defendant did not sufficiently further the fraud to justify a conviction. True, the mailing of fraudulent odometer readings allowed the unwitting retailers to gain the certificate of title necessary to market the cars, which in turn encouraged them to continue to do business with the defendant. Yet the jury could have plausibly concluded that, on balance, the mailings were counterproductive to the fraud because they brought the fraudulent odometer readings to the attention of the authorities.

Alternatively, the jury could simply conclude that, aside from the counterproductive effect of the mailings, the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme. Although the mailings here may have "furthered" the scheme in the literal sense of the word, it is clear that the statute requires something more. For in the modern economy, it is difficult to imagine a transaction that does not at some point involve some tangential use of the mails by some party at least remotely related to the defendant. Lest all fraud be subsumed by the mail fraud statute, the courts require that the mailings further the fraud in the sense that it is at least incidental to an essential element of the fraud. *United States v. Lea*, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980).

Whether the retailers' ability to secure title was essential to the defendant's scheme and whether the mailings of odometer readings to obtain such title were incidental to that end are questions for the jury. These are issues that involve difficult line-drawing problems; this is not a case where a conviction on the lesser offense would require bizarre or overly-imaginative inferences from the evidence. *See Silla*, 555 F.2d at 706-07; *Sinclair*, 444 F.2d at 890.

It is true that in *Galloway*, 664 F.2d at 161, we stressed that a jury could rationally convict on virtually identical facts. But we did not hold the opposite verdict to be irrational; we simply pointed out that the mailings issue was one for the jury to decide. Consistent with *Galloway*, we now hold that the jury could have rationally reached either verdict. Mailings by third parties not under the control of the defendant that indirectly, if at all, further the underlying fraud may or may not be sufficiently "in furtherance" of the fraud to justify a mail fraud conviction; the issue is one of fact, and the two opposite conclusions are both sufficiently plausible to be within the purview of the jury's rational discretion.

III

Because the defendant was entitled to an instruction on odometer tampering, we reverse his convictions and remand for a new trial. Circuit Rule 18 shall not apply.

FAIRCHILD, *Senior Circuit Judge*, concurring in part, dissenting in part.

I concur in Part I, but respectfully dissent from Parts II and III. Even if we assume the adherence of this Circuit to the doctrine of *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), relaxing the traditional concept of a lesser included offense, I do not find an inherent relationship between odometer alteration and mail fraud.

The elements of mail fraud, 18 U.S.C. § 1341, relevant to this case are (1) having devised a scheme to defraud and (2) knowingly causing mail delivery of matter for the purpose of executing the scheme. No particular fraudulent act need have been accomplished, although as in the present case, the devising of the scheme is very commonly proved by showing particular instances of fraudulent conduct and inferring the scheme from the conduct. Such conduct may be criminal under state or federal law but need not be. In the present case it happens to be a federal offense. Defendant's devising a scheme to defraud was established by proof that he had caused odometers to be altered on many automobiles he had acquired and later sold including those to which the twelve mailings related. Under the traditional test of comparing statutory elements, knowing and willful alteration of an odometer is not an element necessarily included in mail fraud.

Moreover, one cannot spell out of the present indictment a charge that defendant knowingly and willfully caused the alteration of the odometer on any particular automobile. Any implication to that effect arises from the fact that each count alleges the mailing, by a dealer, of an application for title for a specified automobile, and charges that defendant caused each mailing for the purpose of executing the scheme.

At trial, in order to prove the creation of the scheme and the relationship of each mailing, the Government proved that the odometer on the particular vehicle was one of those which defendant had caused to be altered. It is this evidence which affords the basis of defendant's claim that the jury should have been told that on each count it could convict him of odometer alteration if not convinced that the mailings furthered the scheme.

The leading case relaxing the traditional test for a lesser included offense is *United States v. Whitaker*,

447 F.2d 314. That opinion, at page 319, states the rule as follows:

> A more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. This latter stipulation is prudently required to foreclose a tendency which might otherwise develop towards misuse by the defense of such rule. In the absence of such restraint defense counsel might be tempted to press the jury for leniency by requesting lesser included offense instructions on every lesser crime that could arguably be made out from any evidence that happened to be introduced at trial.

(Footnote omitted.) The part of the *Whitaker* test which is so clearly lacking in the present case is that the two offenses "must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."

I think that no such close relationship exists between the offenses of odometer alteration and mail fraud.

In *Whitaker*, itself, the offense charged was burglary and the court found that unlawful entry was an included offense where proved even though burglary could occur after an authorized entry.

In *United States v. Pino*, 606 F.2d 908 (10th Cir. 1979), the offense charged was involuntary manslaughter while driving a motor vehicle in an unlawful manner without due caution and the court held that careless operation of a vehicle was an included offense where proved.

In *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980), the offense charged was assault resulting in serious bodily injury and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Stolarz*, 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977), the offense charged was assault with intent to commit murder and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), the offense charged was conspiracy to distribute cocaine and this court held that conspiracy to possess cocaine was an included offense.

The facts of all these cases demonstrate a much closer relationship between the offense not charged but proved in the course of trial and the offense charged than can be discerned between odometer alteration and mail fraud. It seems fair to say that in each case the offense found to be lesser included comes within a hair's breadth of fulfilling the traditional test of comparing statutory elements.

In *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1983), the Tenth Circuit held that there was no inherent relationship between the offense incidentally proved and the offense charged. The defendant had sought a lesser included offense instruction as to violation of EPA Certification Regulations. The charged offenses were conspiracy, mail fraud and racketeering.

There is apparently no case holding that fraudulent conduct which happens to constitute a federal offense and is proved in establishing the elements of mail fraud is included within mail fraud. Indeed, I would suppose that if properly charged, a defendant could be convicted of both odometer alteration and mail fraud and the punishments could be cumulative.

Going on to another point, even if the lesser offense is included in the greater, the evidence must "permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" before defendant is entitled to an instruction on the point. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *United States v. Busic*, 592 F.2d 13, 24-25 (2nd Cir. 1978). With all respect, I do not believe that the evidence and concessions made by defendant in this case leave open any issue of fact as to mailings furthering the scheme. The scheme proved was clearly an ongoing course of business. There was proof that defendant admitted altering odometers on a great many cars over a substantial period of time. In the proof of the twelve counts it was shown that one dealer who bought from defendant made four successive purchases and mailed applications for each of them in order to obtain titles in the names of his customers. Another dealer made five successive purchases and similar mailings. Beyond any doubt, the mailings not only furthered, but were essential to the continued success of the scheme.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 12, 1985

Before

HON. JOEL M. FLAUM, Circuit Judge

HON. LUTHER M. SWYGERT, Senior Circuit Judge

HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin

No. 83 CR 56—Judge Barbara B. Crabb

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Amendment: March 4, 1986

February 27, 1986

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 83 CR 56—Barbara B. Crabb, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to grant a rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on November 12, 1985 be, and are hereby, VACATED. This case will be reheard *en banc* at the convenience of the Court.

The parties are requested to file supplemental briefs on two questions:

1) Whether the inquiry into legislative intent that informs the decision to allow consecutive punishments, *see Garrett v. United States*, 105 S.Ct. 2407 (1985); *United States v. Woodward*, 105 S.Ct. 611 (1985); *Albernaz v. United States*, 450 U.S. 333 (1981); should be used to determine whether one offense is a lesser included or necessarily included offense of another for purposes of Fed. R. Crim. P. 31(c), and if adopted, whether this inquiry has implications to our holding in *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985).

2) Whether, if this inquiry is employed, odometer tampering (in violation of 15 U.S.C. 1984) is a necessarily included offense of mail fraud (in violation of 18 U.S.C. 1341).

The supplemental briefs shall be filed simultaneously on or before March 19, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 CR 56—Barbara B. Crabb, *Judge.*

Reheard *En Banc* June 9, 1986—Decided January 21, 1988

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges*, and SWYGERT* and FAIRCHILD, *Senior Circuit Judges.*

FAIRCHILD, *Senior Circuit Judge.* In *United States v. Schmuck*, 776 F.2d 1369 (7th Cir. 1985), a divided panel decided that under the facts of this mail fraud prosecu-

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* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1369. Because of illness, however, he has not participated further.

tion, the offense of knowing and willful odometer alteration was a lesser included offense within the charged offense of mail fraud. Defendant's conviction was reversed, therefore, because it was error to refuse an instruction under Rule 31(c), F. R. CRIM. P., on the possibility of finding defendant guilty of the odometer offense. Although odometer alteration is not a statutory element of mail fraud, the panel, relying on *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), held that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. 776 F.2d at 1371. Accordingly the odometer offense proved by the evidence constituted a lesser included offense for the purpose of Rule 31(c).

The panel decision was vacated and rehearing *en banc* granted. *United States v. Schmuck*, 784 F.2d 846 (7th Cir. 1986). We now reject the *Whitaker* doctrine and decide that the odometer offense, though proved, was not a lesser included offense, or, as Rule 31(c) says "an offense necessarily included in the offense charged." All other significant claims raised were correctly decided adversely to defendant in Part I of Judge Swygert's opinion, 776 F.2d at 1369-70. We now adopt Part I and affirm.

I

Defendant Schmuck was convicted, after a jury trial, of 12 counts of mail fraud. Each count of the indictment alleged a scheme by Schmuck to defraud purchasers of used automobiles by representing that the automobiles had substantially less mileage than was true. Schmuck would purchase automobiles, cause their odometer readings to be altered, offer them to dealers, and provide purchasing dealers with an odometer statement reflecting the false mileage. The dealers would sell the cars to retail customers. Both the dealers and the customers would rely on the false readings and pay more than if readings had not been reduced. In order to obtain titles in the names of their customers, the dealers would mail Wisconsin title

applications to the Wisconsin Department of Transportation. Each count of the indictment alleged the mailing of an application for title for an automobile by a dealer on a specified date. Five different dealers were named; three dealers made only one mailing, one made four, and one five. It was charged that Schmuck caused each mailing for the purpose of executing the scheme.

Pursuant to Rule 31(c), defendant moved prior to trial for an instruction that would have permitted the jury to convict him of odometer alteration as a lesser included offense of mail fraud, presumably on each count. That motion was denied. He was convicted and appealed.

In reversing and remanding for a new trial, the panel rejected the "traditional" definition of a lesser included offense, in favor of the "inherent relationship" approach first expounded in *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The traditional (elements) test requires identity of the elements of the two offenses, such that some of the elements of the crime charged themselves comprise a separate, lesser offense; to be necessarily included, the elements of the lesser offense must be a subset of the elements of the charged offense. *See Sansone v. United States*, 380 U.S. 343, 349-50 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of the Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3rd Cir. 1977). Thus where the lesser offense requires an element not required for the greater offense, an instruction should be refused.[1]

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[1] Several courts have listed five conditions to be met where a Rule 31(c) instruction is requested. The second is "the elements of the lesser offense must be identical to part of the elements of the greater offense" and the fifth "in general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded by either the prosecution or defense." *Whitaker*, 447 F.2d at 317; *United States v. Campbell*, 652 F.2d 760, 761 (8th Cir. 1981); *United States v. Chapman*, 615 F.2d 1294, 1299 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980); *but*

Broadly speaking, there are two elements of an offense under the mail fraud statute: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts); and (2) use of mail for the purpose of executing the scheme or attempting to do so.[2] It is not required that any part of the contemplated scheme be performed, although in practice fraudulent conduct usually is proved in order to establish the scheme. The odometer offense consists of knowingly and willfully altering or causing alteration of an odometer with intent to change the number of miles indicated.[3] Each statute

see n.5 *infra*, as to Tenth Circuit position. Another formulation is that the lesser offense must be such that it is impossible to commit the greater offense without having committed the lesser. *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 554 (3rd Cir. 1967). "The lesser included offense doctrine does not apply where the lesser offense includes an element, such as possession, not required for the greater offense." *Campbell*, 652 F.2d at 763.

[2] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] 15 U.S.C. § 1984 provides:

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

[Continued]

requires proof of facts not required by the other. The two offenses are separate. *Blockburger v. United States*, 284 U.S. 184, 187-88 (1957).

In determining, for this purpose, the elements of the offense charged, the ordinary focus is upon the statute defining the offense. Where the statute prescribes an element in general language, capable of wide variation in types of conduct, e.g., mail fraud, falsification (18 U.S.C. § 1001), continuing criminal enterprise (21 U.S.C. § 848), RICO (18 U.S.C. § 1963), failure to perform any of several types of statutory duty (e.g., 26 U.S.C. § 7203) there is logical appeal for the proposition that the terms of the indictment will narrow the scope of the elements to be examined. *See United States v. Stavros*, 597 F.2d 108, 110 (7th Cir. 1979); *but see United States v. Kimberlin*, 781 F.2d 1247, 1257 n.10 (7th Cir. 1985). Given the present indictment, however, alleging as one element devising a scheme to defraud purchasers of automobiles with altered odometers, knowingly and willfully causing an odometer to be altered is not identical to the element of having devised the scheme.

The District of Columbia Circuit rejected strict comparison of elements in favor of inquiry whether there was an "inherent relationship" between the crime charged and a lesser offense proved at trial. The defendant in *Whitaker* had been charged with first degree burglary, and his request for an instruction permitting conviction of the lesser offense of unlawful entry was denied, because the District of Columbia Code did not exclusively require unlawful entry as an element of first degree burglary, and therefore unlawful entry would not be a lesser included offense under the traditional test. However, because the proof showed that defendant had, in

[3] [Continued]

> § 1990c(a) prescribes a misdemeanor penalty for knowing and willful violation of any provision of the subchapter, including § 1984.

fact, committed the burglary by means of an unlawful entry, in reversing and remanding for a new trial, the court held that

> [a] more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

447 F.2d at 319.

The *Whitaker* court went on to note that the Constitution and the common law require that the charge in the indictment give the defendant notice that he could also be convicted of any lesser included offenses, if the evidence so warrants. The prosecution as well as the defendant may seek an instruction pursuant to Rule 31(c) under the traditional test, because all elements of the lesser included offense have, by definition, been charged. *Whitaker* dispensed with the mutuality requirement, because of "considerations of justice and good judicial administration. . . . [T]he defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right . . . [and] doubt as to whether the prosecution could rightfully have requested such a charge should not bar the charge being given at the request of the defense." *Id.* at 321.

Applying the *Whitaker* approach, the panel in the present case concluded that

> there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. . . . [I]t can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. . . . An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

776 F.2d at 1371.

Having found the requisite relationship between odometer alteration and mail fraud, the panel turned to the second requirement of the right to a lesser included offense instruction: whether the proof of the element necessary for the greater crime but not for the lesser crime is sufficiently in dispute so that a rational jury could find the defendant not guilty of the greater but guilty of the lesser. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Sansone v. United States*, 380 U.S. 343, 350 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). Whatever the test used to determine whether one offense is included within another, there is agreement that there must be a separable issue in the case as to the distinguishing element. *Cf., e.g., United States v. Pino*, 606 F.2d 908, 917 (10th Cir. 1979) (inherent relationship approach) with *United States v. Campbell*, 652 F.2d 760, 763 (8th Cir. 1981) (traditional test). The panel held that the jury could have rationally found that the mailings were counterproductive to the fraud because they brought the fraudulent readings to the authorities' attention, or that the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme.

II

A. *Rule 31(c)*

We reject the inherent relationship test,[4] and hold that an offense is necessarily included within another for the purpose of Rule 31(c) only when the elements of the lesser offense form a subset of the elements of the charged offense.[5] The elements approach is grounded in

[4] The author of this opinion also adheres to his previously expressed view that there is no inherent relationship between odometer alteration and mail fraud even if the *Whitaker* doctrine were to prevail. 776 F.2d at 1373-75, Fairchild, *J.*, concurring in part, dissenting in part.

[5] The Second Circuit states the test in terms of elements. *See United States v. Lo Russo*, 695 F.2d 45, 52 n.3 (2d Cir. 1982), *cert. denied sub nom. Errante v. United States*, 460 U.S. 1070 (1983). We have found no case, however, where the Second Circuit has rejected the *Whitaker* approach. The Third Circuit states the elements test and asserts specifically "[t]he elements of the offense are compared *in the abstract*, without looking to the facts of the particular case." *Government of Virgin Islands v. Joseph*, 765 F.2d 394, 396 (3rd Cir. 1985). The Eighth Circuit has adhered to the elements test, noting, but taking no position on, the question of abandoning mutuality. *United States v. Campbell*, 652 F.2d 760, 762-63 (8th Cir. 1981).

Decisions of the Fourth Circuit, *see United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976), and the Fifth Circuit, *see United States v. Williams*, 775 F.2d 1295, 1302 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1477 (1986), are consistent with the elements approach.

Circuits adopting the inherent relationship test are the District of Columbia, *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971); and the Ninth, *United States v. Martin*, 783 F.2d 1449, 1451-53 (9th Cir. 1986).

The Tenth Circuit adopted the *Whitaker* doctrine in a 1979 decision, *United States v. Pino*, 606 F.2d 908, 914-17 (10th Cir. 1979). In a 1980 decision, the court stated the traditional test, including the requirement of mutuality. *United States v. Chapman*, 615 F.2d 1294, 1298-99 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980). In 1982, the court applied the *Whitaker* doctrine, *citing Pino*, but not *Chapman*. *United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir.), *cert. denied sub nom. Porter v. United States*, 464 U.S. 828 (1983). *Zang* happened to be a prosecution for mail fraud. The scheme to defraud involved overcharging for crude oil by miscertification of the "tier" of the oil. Such miscertification was a violation of EPA regulations, and the court found this violation was not a lesser included offense because there was no inherent relationship between it and mail fraud. In 1987, the Tenth Circuit relied on *Pino* and *Whitaker* in affirming the conviction of a lesser offense, one element of which was not included in the offense charged. *USA v. Cooper*, 812 F.2d 1283 (10th Cir. 1987). The dissenting judge would approve the *Whitaker* doctrine where a defendant requested the instruction, but concluded that in the case before the court, defendant had been convicted of an offense not charged.

the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of "necessarily included" under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy.

Although the Supreme Court has not spoken directly to this issue,[6] we believe that decisions involving Rule 31(c) motions suggest the Court's adherence to the traditional method. In *Keeble v. United States*, 412 U.S. 205 (1973), the Court held the defendant entitled to an instruction on a lesser included offense. The Court compared the statutory elements of the offense charged—assault with intent to commit serious bodily injury—with those of the offense on which an instruction was sought —simple assault—stating

> an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.

[6] The Court has articulated a statutory elements test for a lesser included offense for double jeopardy purposes. *See, infra*, pp. 12-13.

Id. at 213. The Court did note the *Whitaker* decision and that it had dispensed with mutuality as a necessary prerequisite to the defendant's right to a lesser included offense instruction. The Court found it unnecessary to decide that question. *Id.* at 214 at 14.

Similarly, in *Sansone v. United States*, 380 U.S. 343 (1965), the elements of violation of § 7201 of the Internal Revenue Code of 1954, willful tax evasion, were compared with those of § 7207, willful filing of a fraudulent or false return, and § 7203, willful failure to pay taxes when required, to determine whether the latter misdemeanors were offenses included within the felony charged under § 7201. The Court determined that petitioner was not entitled to a lesser included offense instruction because on the facts of the case, the three statutes covered the same ground. The Court said that "§ 7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses" and instruction should be given if a jury could rationally find that "although all the elements of § 7201 have not been proved, all the elements of one or more lesser offenses have been" proved. *Id.* at 351; *see also Berra v. United States*, 351 U.S. 131, 134 (1956) ("where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction").

These cases counsel in favor of the elements test because the Court examined and compared statutory elements in deciding whether the lesser offense was necessarily included in the offense charged. The decisions nowhere suggest any different inquiry into the relationship between offenses, nor any relaxation of the traditional test where a lesser offense proved could be deemed inherently related to the charged offense.

The statutory elements test is also faithful to the text of Rule 31(c), where the critical phrase is "necessarily included in the offense charged." The inherent relationship approach in effect reads out "necessarily included in" and substitutes something like "factually related to and serves the same policy goals as" the charged offense. Neither the court in *Whitaker* nor any decision adopting its analysis has addressed how the language of the Rule gives rise to the inherent relationship test.

The text of the Rule makes no distinction between a motion made by the defendant or by the government. Yet the inherent relationship approach requires that motions by the government and the defendant be treated differently, because the charge of the greater offense does not give notice that defendant is facing a charge of a lesser offense all the elements of which are not identical to elements of the charged offense. If the determination whether the crimes are sufficiently related is not made until all the evidence is developed at trial, the defendant may not have had notice constitutionally sufficient to support an instruction at the prosecution's request. Thus, the relationship test dispenses with the requirement of mutuality without explaining how the text of the Rule supports a different result depending upon who makes the motion.

Moreover, the history of the Rule suggests that it codified the traditional approach. "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Beck v. Alabama*, 447 U.S. 625, 633 (1980); *United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *see* 2M Hale, Pleas of the Crown 301-02 (1736); *Rex v. Withal & Overend*, 168 Eng. Rep. 146 (1772). In 1872, this concept was enacted as a statute,[7] now contained in Rule 31(c). The advisory Committee

[7] "[I]n all criminal cases the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment. . . ." 17 Stat. 197, 198 (1872).

Notes state that the Rule is a "restatement of existing law." *See Keeble*, 412 U.S. at 208 n.6. Thus, there is no indication that the Rule was intended to abrogate the traditional approach to lesser included offenses, including the availability of an instruction in aid of the Government, nor can the Supreme Court's recognition of the defendant's right to an instruction be read as an endorsement of any non-mutual restrictions on the Government.

A significant consideration is the inherent relationship test's lack of certainty and predictability. *See United States v. Johnson*, 637 F.2d 1224, 1238 (9th Cir. 1980) (statutory approach "may be appealing in its promise of certainty and intellectual purity"). Finding an inherent relationship requires a determination that the offenses relate to the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. *Whitaker*, 447 F.2d at 319. These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ.

Another problem with relaxation of the traditional test is that relaxation may well permit defendants to seek a lenient outcome by requesting a lesser included offense instruction on every lesser offense that could possibly be made out from the evidence. This tendency to misuse the Rule was recognized in *Whitaker*, and is the reason why the *Whitaker* court required that there must be an inherent relationship between the lesser offense and the offense charged. 447 F.2d at 319.

We find, on balance, no persuasive reason to substitute the *Whitaker* doctrine for the traditional approach.[8]

[8] In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), defendants were charged with conspiracy to distribute cocaine. The district court found insufficient evidence, but submitted an amended charge of conspiracy to possess, and defendants were convicted. [Continued]

B. Double Jeopardy and Cumulative Punishment

Rule 31(c) uses the language, "an offense necessarily included in the offense charged." Many of the decisions on a Rule 31(c) problem use the term "lesser included offense." The "lesser included offense" concept is also significant in determining certain claims of double jeopardy or unlawful cumulative punishment. *See Brown v. Ohio*, 432 U.S. 161 (1977).

It seems desirable that, as nearly as possible, the terminology should have the same meaning in both contexts. Using the elements test for Rule 31(c) problems at least approaches keeping the same meaning.

It is at least arguable that in the double jeopardy and cumulative punishment contexts the requisite identity of elements is to be determined solely from comparison of the two statutes, and that the indictment does not narrow the type of elements to be examined. *Brown*, 432 U.S. at 168; *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Woodward*, 469 U.S. 105, 108; *United States v. Kimberlin*, 781 F.2d 1257, 1255-57 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 419 (1986). The focus is "on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Illinois v. Vitale*, 447 U.S. 410, 416 (1980). We need not decide in the case before us whether the allegations of the indictment will properly narrow the scope of the statutory elements to be examined in a given case.

The judgment appealed from is AFFIRMED.

[8] [Continued]
Although there was no discussion of *Whitaker*, this court affirmed, holding that conspiracy to possess (proved) was a lesser included offense of the charged conspiracy to distribute. *Id.* at 599. Because it is possible for persons acquiring lawful possession to conspire to distribute, the elements test seems not to have been fulfilled. To the extent that *Cova* stands for a permitted departure from the elements test, it is overruled. *See also* reference to *Cova* in *United States v. Kimberlin*, 781 F.2d 1247, 1256-57, and n.10.

FLAUM, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, dissenting.

I do not agree with the majority's conclusion that the use of the "inherent relationship" test in determining when to give a lesser included offense instruction contravenes either the language or purpose of Federal Rule of Criminal Procedure 31(c). Accordingly, I would leave *United States v. Cova*, 775 F.2d 595 (7th Cir. 1985), and its predecessors intact as the law of this circuit. Applying that test, I conclude that the district court erred in denying the defendant's requested lesser included offense instruction on odometer tampering.

I.

It seems to me inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial, which will always permit the most complete assessment of what instructions the record will support. Nonetheless, the majority concludes that to do so would violate the text of Rule 31(c), which provides in relevant part that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ." The rule does not specifically mention instructions. Nevertheless, we know they are necessary to inform the jury of the existence and elements of appropriate offenses. None of the reasons advanced by the majority persuade me that a more constricted analysis of whether an instruction is supportable is necessary or even desirable simply because the proposed instruction presents the jury with an optional lesser charge. If the record fairly and rationally supports a tendered instruction, and if the instruction comports with the law on the subject and does not unfairly prejudice any party, we have no grounds for barring it.

To confine the determination of whether to give an instruction to an analysis of statutes is to impose an artificial restraint on the instruction formulation process.

Nowhere is this artificiality more apparent than in *Cova*, the case that the majority herein overrules. In that case this court held that in light of the manner in which the government had proved its case, conspiracy to possess cocaine was a lesser included offense of conspiracy to distribute it. Conspiracy was a lesser included offense because the government offered proof that the defendant's method of supposed distribution included obtaining possession. 755 F.2d at 598. The majority of this *en banc* court concludes that *Cova's* result could not be sustained under the element comparison test "[b]ecause it is possible for persons acquiring lawful possession to conspire to distribute," an occurrence that is probably rare but, more significantly, is completely alien to the government's theory in *Cova*. *See supra* n.8. In plain terms, had the "elements" test been applied in *Cova*, the government would have lost a case that it had proved for a reason that had nothing to do with the case itself.

The test applied in *Cova* does not really change the question to be asked under Rule 31(c) in determining whether an instruction on a lesser offense should be given; rather, it simply expands the scope of the inquiry undertaken in answering that question. After all, it is the indictment that delimits the "offense charged" by the government in a particular case. The specific offense is further defined by the proof presented by the government at trial. Permitting consideration of the indictment and succeeding evidence, *in addition* to the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the "offense charged" in a given case, and of the lesser offenses necessarily subsumed therein. An assessment of what offenses the government has *proved* beyond those it charged can hardly be conducted without considering what the government's proof was.

The need for a complete method of determining what lesser offenses are included within a charged offense is

particularly great where, as here, the statute at issue is one that can be violated in a number of ways. Indeed, the past several years have seen the enactment of a number of criminal statutes than can be violated in various ways, and that in fact are specifically predicated on violations of any number of other legal provisions. *See, e.g.*, 18 U.S.C. § 1963 (RICO); and 21 U.S.C. § 848 (Continuing Criminal Enterprise). The mail fraud statute at issue herein, 18 U.S.C. § 1341, also defines a violation in terms of other offensive conduct. It does not, however, attempt to limit the specific varieties of pertinent conduct in order to afford the government broad authority to battle particular fields of crime. These statutes are umbrella-like and, especially where RICO and the CCE statute are concerned, carry extensive penalties. They are exactly the type of offenses for which consideration of lesser offenses is appropriate under Rule 31(c), but it is hard to imagine how any lesser included offense could even be considered under the elements test, precisely because these "greater" offenses are so broadly defined. The lesser offense, because of its specific nature, will always contain elements not necessary for conviction under the broader statute. It is this exact concern that recently led a panel of the Tenth Circuit, in three separate opinions, to conclude that both the "elements" test and the "inherent relationship" test are valid, and that the use of each should be dictated by the nature of the individual case. *United States v. Cooper*, 812 F.2d 1283, 1285-86 (10th Cir. 1987); *id.* at 1287 (Baldock, J., concurring); *id.* at 1289 (McKay, J., concurring and dissenting).

The majority also decries the "inherent relationship" test because it necessarily results in the abandonment of the rule of "mutuality," which allows one party to request an instruction on a lesser included offense only if the other party also could have done so. This rule is inconsistent with a test for lesser included offenses that takes into account the evidence introduced at trial because the government is not permitted to alter the charges con-

tained in the indictment when it submits them to the trier of fact if such alteration would prejudice the defendant, *i.e.* (as is relevant here) if the original indictment did not put the defendant on notice of the possibility of the alternate charge. *See generally Stirone v. United States*, 361 U.S. 212, 215-18 (1960); *United States v. Cina*, 699 F.2d 853, 857-58 (7th Cir. 1983). This latter rule, it should be noted, is the product of concerns for fairness at trial and the recognition of the role of an indictment in informing a defendant of the nature of the charges against him, as opposed to any specific concern for the relationship of the offenses to one another. The *Whitaker* court, in formulating the "inherent relationship" test, recognized that these principles of fairness would be violated if the government were permitted to submit an alternative charge to the jury that, although supported by the trial record, was not sufficiently foreshadowed by the indictment. Accordingly, that court determined that the principle of mutuality should be "dispens[ed] with" so that the "inherent relationship" test could be applied. 447 F.2d at 320-22.

I agree with the *Whitaker* court's conclusion that the principle of mutuality is not necessary to the fair administration of justice and that it is properly discarded in favor of the "inherent relationship" test. In an ideal world, where all lawyers would be omniscient, *both* sides would be able to request instructions on lesser offenses based on the full trial record, which would have been anticipated before trial by omniscient defense counsel. In the real world, however, fairness requires that the prosecution be allowed to request only instructions that could fairly have been expected prior to trial. Defendants should be allowed to request instructions based on all the information available to them at the time of the request, including the trial record, thereby waiving any claim that *they* were not on notice. It may be, as the *Whitaker* court concluded that this distinction gives no unfair advantage to defendants over prosecutors because prosecutors, who

bear the burden of proof, will be able to assess the likely state of the record in advance and make their charging decisions accordingly. 447 F.2d at 321. Even if there is some advantage gained by defendants due to the abandonment of mutuality, that advantage is outweighed by the interests of justice that favor continued adherence to the "inherent relationship" test. This is hardly the only area of criminal trial law in which different rights accrue to the two respective sides.[1]

II.

I turn now to an evaluation of the instant case under the test originally formulated in *Whitaker* and refined by this court in *Cova* and several preceding cases, as well as in the panel opinion in this case. A comparison of the elements of the two crimes, mail fraud and odometer alteration, reveals (as the majority concludes) that the latter does not fall within the former as they are

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[1] The majority also opines that it "seems desirable" that the same test be used for determining whether a lesser offense instruction should be given and for determining whether cumulative punishment and/or separate trial is permissible on two charged offenses. *Supra* p. 13. I do not see why this identity is required. If a more expansive test is used for instruction purposes, the result will be that in some cases both instructions will be allowed where the two offenses could be punished cumulatively or tried separately, *i.e.* where they are "separate" offenses under the elements test. I do not foresee any undesirable consequences flowing from this eventuality. If a defendant in such a case is acquitted on both charges he cannot be retried on either, not because of their relationship but because the acquittal itself acts as a bar. The same is true if the defendant if only convicted of the lesser offense; he could not be retried on the greater because his lesser conviction represents an implied acquittal on the greater charge. If he is convicted of the greater offense there is a *theoretical* possibility that the government could retry him on the lesser charge (because the jury never considered it), but this is highly unlikely. Of course, in a case such as the one I have just described the prosecution presumably would be free to charge both offenses initially and to seek consecutive sentences thereon.

defined in the statute; proof of odometer alteration is not an element of mail fraud. In fact, no particular crime or unlawful conduct (or, for that matter, particular lawful conduct) is proscribed by the mail fraud statute with the exception of the act of mailing or causing matter to be mailed. This illustrates an earlier point, *i.e.* that statutes like the mail fraud provision, broadly drafted to encompass whole classes of illegal activity, will have few if any lesser included offenses under the elements test. Nevertheless it is clear to me that when the indictment and trial record are taken into account, the offense of odometer tampering should be considered a lesser included offense of mail fraud in this case.

In the instant case, the mailings that were the subject of the charges against the defendant were not separate from the fraudulent *acts* of which he was accused, but followed those acts both logically and chronologically. The mailings of the title applications by the defrauded car dealers, which the government claimed were caused by the defendant, were the direct result of the sales of altered cars. These sales were in turn the result of the odometer alterations that the defendant now asserts are lesser included offenses. As the government proved *this* case, it *had* to prove odometer tampering because tampering led to sale, which led to mailing. Had the charged mailings occurred before the tampering and/or in furtherance of the scheme (*e.g.* a letter from defendant to a confederate instructing him on tampering procedures or to a dealer proposing a fraudulent sale), it would not have been necessary to prove any fraudulent conduct beyond that of devising the scheme.[2] As is frequently the

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[2] In view of this analysis, the original panel opinion may have gone farther than necessary in declaring generally that "there is an inherent relationship between mail fraud and the 'fraud' that underlies the mail fraud offenses." 776 F.2d at 1371. This may not always be the case, as the illustration in the text suggests. The analysis this court applied in *Cova* reflects, in my view, the correct use of information beyond the mere statutory elements by

case, though, the government proved fraud in this instance by proving execution. In this case it *had to* prove execution because the charged mailings would not have occurred if the fraud had not been carried out. In this case, therefore, "proof of the lesser offense [was] necessarily presented as part of the showing of the commission of the greater offense." *Whitaker*, 447 F.2d at 319 (footnote omitted).

III.

The conclusion that odometer tampering should be considered as a lesser included offense of mail fraud in this case does not complete the inquiry necessary to determine whether an odometer tampering instruction should have been given. Even if a lesser offense is included in a greater offense (either under the majority's test or under the *Cova* test), a lesser offense instruction should not be given unless the evidence permits the jury "rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). *See also United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). As Judge Swygert pointed out in his original panel opinion, this requirement serves two functions: it prevents a defendant from using a lesser offense instruction simply as a device to allow him to ask for mercy from the jury, and it preserves the district judge's domain over questions of law and the jury's over questions of fact. 776 F.2d at 1371-72. In the present case the defendant presented at trial a rational basis upon which the jury could have found him guilty of odometer tampering but not guilty of mail fraud. The district court therefore erred in denying the defendant's request for the odometer tampering instruction.

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concentrating on the case as charged and tried, even though this may reflect some difference with the *Whitaker* court's formulation. There is really no need to discuss in the context of jury instructions how a prosecutor would "generally" charge or prove mail fraud when a black-and-white indictment and a real evidentiary record are available.

At the close of the government's case, the defendant moved for a directed verdict of acquittal, basing his motion in part on *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), a case that concerned a nearly identical mail fraud scheme. In *Galloway* the defendant argued that his conviction under the mail fraud statute was precluded by the fact that the title documents mailed by the car dealers actually led to his capture, *i.e.* that they were counterproductive to rather than in furtherance of his fraudulent scheme. This court disagreed, concluding that the mailings were necessary to complete the retail sale of the automobiles and that they could not therefore be considered counterproductive to the scheme. 664 F.2d at 165, *distinguishing United States v. Maze*, 414 U.S. 395 (1974). In *Galloway*, however, the title applications that were contained in the unlawful mailings did not include odometer readings because none were required. This court noted that "[s]uch a requirement, of course, might have made detection of the scheme more likely." 664 F.2d at 165 n.7.

In his motion for a directed verdict, the defendant argued that the odometer readings in the title forms mailed in his case (the existence and inclusion of which were not disputed) made them counterproductive to his scheme as a matter of law. The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury.[3] It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction. The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that

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[3] Trial Transcript, p. 114. In his closing argument to the jury, defendant's counsel in fact argued that the mailings actually endangered the scheme to the point where they could not be considered "in furtherance." *Id.* at p. 173.

the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the fraudulent car sale scheme. Because this rational possibility existed based on the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering.

The test adopted today by the majority for determining the propriety of lesser offense instructions has one virtue: it is the simpler of the two to apply. In the end, though, it disserves the purpose for which such instructions are allowed by separating the inquiry from its proper foundation. That the *Cova* test is more complex is not so much the result of its own inherent difficulty as of the necessary complexity of trials. Where jury instructions are concerned, accuracy has always been the goal, both in the law as they state it and in the analysis of their support in trial records. I see no reason, either in Rule 31(c) or elsewhere, to turn to an antiseptic and unworldly formula, one which will, I believe, come to hinder both defense and prosecutorial efforts. Nowhere is this possibility made clearer than in *Cova*, the case that is overruled today. Accordingly I respectfully dissent from the affirmance of the defendant's conviction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 21, 1988

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge *
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

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* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1369. Because of illness, however, he has not participated further.

Appeal from the United States District Court
for the Western District of Wisconsin

No. 83 CR 56—BARBARA B. CRABB, Judge

JUDGMENT ORDER ON REHEARING

This cause was reheard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

SUPREME COURT OF THE UNITED STATES

No. 87-6431

WAYNE T. SCHMUCK,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

May 16, 1988

No. 87-6431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE T. SCHMUCK,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. Was it error to deny petitioner's motions for judgment of acquittal on the charges of mail fraud where the mailing of automobile title documents by the subsequent purchasers of the automobiles in which petitioner had rolled back the odometers were actually counterproductive to his odometer tampering scheme, or at most routine mailings tangentially related to his scheme, and not in furtherance thereof?

2. Was it error to deny petitioner's request for a jury instruction on odometer tampering, 15 U.S.C. section 1984, as a lesser offense "inherently related" to the charged offense of mail fraud, 18 U.S.C. section 1341, where the abundant references to petitioner's odometer tampering may have influenced the jury to convict him of mail fraud in a weak case?

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This case was initially reported in a panel decision as *United States* v. *Schmuck*, 776 F.2d 1368 (7th Cir. 1985). The panel decision was vacated and rehearing *en banc* was ordered, *United States* v. *Schmuck*, 784 F.2d 846 (7th Cir. 1986). The *en banc* opinion reversing the panel decision appears at 840 F.2d 384 (7th Cir. 1988). The Petition for Writ of Certiorari included an Appendix reproducing the opinions below.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) and Rule 20.1 of the Rules of the Supreme Court. The Judgment Order On Rehearing of the United States Court of Appeals for the Seventh Circuit, reversing the panel decision and upholding petitioner's conviction, was entered on January 21, 1988. The petition for a writ of certiorari was filed with this Court on February 16, 1988. This Court's order granting the petition for writ of certiorari was entered on May 16, 1988.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. CONSTITUTIONAL PROVISIONS

(a) No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

(*United States Constitution, Amendment Five*).

(b) In all criminal proceedings, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ., and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense. (*United States Constitution, Amendment Six*).

(c) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted. (*United States Constitution, Amendment Eight*).

2. STATUTORY PROVISIONS

(a) Whoever, having devised . . . any scheme or artifice to defraud . . ., for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . ., or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both. (Mail Fraud, 18 U.S.C. § 1341).

(b) No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon. (Odometer Tampering, 15 U.S.C. § 1984).

(c) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter . . . shall be fined not more than $50,000 or imprisoned not more than one year, or both. (15 U.S.C. § 1990c, as added Pub. L. 94-364, Title IV, § 408 (2), 90 Stat. 985).

3. REGULATIONS

(a) CONVICTION OF LESS OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged . . . . (Rule 31 (c), Fed. Rules of Crim. Procedure).

(b) MOTION FOR JUDGMENT OF ACQUITTAL.

(a) Motion before Submission to Jury . . . . The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses

charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty . . ., a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged . . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal . . . . (Rule 29 (a) & (c), Fed. Rules of Crim. Procedure).

(c) INSTRUCTIONS. At the close of the evidence . . . any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . . (Rule 30, Fed. Rules of Crim. Procedure).

STATEMENT OF THE CASE

The facts of this appeal are not in dispute. Petitioner was engaged in a fraudulent scheme involving the sale of used cars with their odometers rolled back. He was indicted on August 23, 1983 in the United States District Court for the Western District of Wisconsin on twelve counts of violating 18 U.S.C. § 1341, prohibiting mail fraud. Jurisdiction in the District Court was based on 18 U.S.C. § 3231.

The mail fraud charges hinged on the fact that after petitioner sold the cars, the new owners mailed the title documents into the Wisconsin Department of Motor Vehicles in order to record the change in ownership. Petitioner raised the question of whether these mailings were so tangential to his scheme that they could not support a mail fraud conviction, by filing a motion to dismiss the indictment, citing *United States* v. *Maze*, 414 U.S. 395 (1974).

The District Court denied the motion to dismiss on November 11, 1983, by written order which appears in the Joint Appendix at p. 11 (hereinafter Joint App.) The Court interpreted *Maze*, *supra*, as holding that mailings which enhance the probability of detection are not "furthering" a scheme, and cannot support a mail fraud charge. However, the Court ruled that the jury should decide whether the mailings in question furthered the scheme.

The indictment against petitioner charged him, in Paragraph Four, with actions that constituted a violation of 15 U.S.C. § 1984, prohibiting odometer tampering. (The indictment appears at Joint App. p. 3) At the final pretrial conference, petitioner requested that an instruction be given to the jury on odometer tampering as a lesser included offense, relying on the existence of an inherent relationship between the lesser offense, odometer tampering, and the greater offense, mail fraud. The doctrine of "inherent relationship" allows conviction of a lesser offense even where the lesser offense includes elements not required for proof of the greater offense, and has been accepted as the better rule by the District of Columbia Circuit, (*United States* v. *Whitaker*, 447 F.2d 314 (1971)), the Tenth Circuit, (*United States* v. *Pino*, 606 F.2d 908 (1979)), and the Ninth Circuit, (*United States* v. *Johnson*, 637 F.2d 1224 (1980)).

Sometimes the inherent relationship rule benefits the prosecution, *vid. United States* v. *Cova*, 755 F.2d 595 (7th Cir. 1985), *United States* v. *Stolarz*, 550 F.2d 488 (9th Cir. 1977), *cert. den.*, 434 U.S. 851 (1977), *United States* v. *Cooper*, 812 F.2d 1283 (10th Cir. 1987), *United States* v. *Martin*, 783 F.2d 1449 (9th Cir. 1986). The District Court denied the request for the lesser included offense instruction, but did grant petitioner's request to let the jury

decide whether the mailings in question actually furthered his scheme. (The final pretrial conference order, of December 16, 1983, appears at Joint App. p. 29).

During the presentation of the government's case, petitioner's counsel brought out the fact that the documents which were mailed in almost every case actually contained the falsified odometer reading, so that a simple comparison of the mailed documents with the odometer statements from the prior car owners demonstrated petitioner's fraud. At the close of the government's case, petitioner moved for judgment of acquittal under F.R. Crim. P. 29(a). Petitioner relied on *United States* v. *Maze*, *supra*, and a Seventh Circuit case, *United States* v. *Galloway*, 664 F.2d 161 (1981). *Galloway* was another mail fraud prosecution grounded in an odometer tampering scheme, differing only in the circumstance that the mailings in *Galloway* did not contain odometer readings. The same District Court Judge as in the present case, the Honorable Barbara B. Crabb, had presided over the trial in *Galloway*, and had granted a directed verdict of not guilty in that case, relying on *Maze*. The Court of Appeals reinstated the conviction in *Galloway*, but suggested in a footnote that had the mailings contained odometer readings, detection of Galloway's scheme might have been rendered likely by the mailings, which would bring them within the scope of *Maze*.

The motion for judgment of acquittal was denied, and petitioner presented his evidence, tending to show how the mailings in question helped to uncover his scheme. Prior to counsels' arguments, the government requested a motion *in limine* prohibiting petitioner's counsel from arguing to the jury that petitioner had committed odometer tampering, but not mail fraud, on the grounds that such an argument was a back door way of introducing

the lesser included offense. The Court granted the motion. During rebuttal the prosecutor suggested to the jury that the defendant would escape punishment for his odometer tampering if he was acquitted of the mail fraud charges.

A verdict of guilty on all twelve counts in the indictment was returned on December 20, 1983, and petitioner renewed his motion for a judgment of acquittal, or in the alternative for a new trial. Petitioner argued that the Court, by denying the lesser included offense instruction, yet permitting the government to introduce a great deal of evidence relevant to odometer tampering, had allowed the government to bolster a weak mail fraud case by appealing to the jury's hostility to odometer tampering. The motion for judgment of acquittal or for a new trial was denied by the Court on December 29, 1983. (The order appears at Joint App. p. 60) Petitioner was sentenced on February 24, 1984, to 90 days in jail and fined $550.00, and placed on probation for four years. (The judgment of conviction and sentence appear at Joint App. p. 65) Petitioner filed a notice of appeal the same day, and execution of sentence was stayed pending appeal to the Court of Appeals for the Seventh Circuit, where jurisdiction was based on 28 U.S.C. § 1291.

Petitioner's appeal raised seven related issues, but the basic points were that the mailings in question were too counterproductive or tangential to his scheme to fairly support a charge of mail fraud, *United States* v. *Maze*, *supra*, and that the government used the fact that petitioner had engaged in odometer tampering to lower its burden of proof, leading the jury to convict him of mail fraud in a doubtful case rather than let an acknowledged odometer tamperer go free, *Keeble* v. *United States*, 412 U.S. 205 (1973). The lesser included offense instruction

would have been an appropriate way of preventing this appeal to jury prejudice.

Petitioner's appeal was argued orally on September 13, 1984. On November 12, 1985, the three judge panel reversed petitioner's conviction and ordered a new trial, ruling by a split decision that petitioner should have been afforded the lesser included offense instruction. (The panel decision appears at Joint App. p. 69) The decision is reported at *United States* v. *Schmuck*, 776 F.2d 1368 (7th Cir. 1985). The panel accepted petitioner's argument that the law of the Seventh Circuit applied the "inherent relationship" test for lesser included offense instructions, and found that a genuine issue of fact existed as to whether the mailings in question furthered the fraudulent scheme or were counterproductive or merely tangential to the scheme. The panel relied on *United States* v. *Cova*, 755 F.2d 595 (7th Cir. 1985), which used the "inherent relationship" rule to uphold a conviction for a lesser offense that did not fit within the greater offense under the traditional "elements" test. Judge Flaum, who sat on the panel in *Cova*, also sat on the panel in petitioner's case, and voted to apply the "inherent relationship" rule in both cases, although in *Cova* it was the government that benefitted by the application of the rule, and in the present case it is the petitioner who benefitted.

After the panel decision, the government requested a rehearing *en banc*. The request was granted (*United States* v. *Schmuck*, 784 F.2d 846 (7th Cir. 1986), and oral argument before the *en banc* panel was heard on June 9, 1986. (The order for rehearing appears at Joint App. p.85.) The argument focused on whether the "inherent relationship" test or the "elements" test should be used in determining a lesser or necessarily included offense under F.R. Crim. P. 31(c).

On January 21, 1988, the *en banc* Circuit reversed the panel decision and affirmed the conviction, expressly rejecting the "inherent relationship" test, and overruling *Cova*, *supra*. The decision appears at *United States* v. *Schmuck*, 840 F.2d 384. Judge Flaum, joined by Judge Cudahy, dissented, arguing for application of the "inherent relationship" rule as the established law of the circuit, and the better rule. Chief Judge Bauer, the author of the decision in *Cova* applying the "inherent relationship" test, and Judge Coffey, the third panel member in *Cova*, joined in rejecting the "inherent relationship" test in the present case, without explaining why their opinion on this question had changed. (The *en banc* opinion appears at Joint App. p. 87.)

Petitioner sought review of the decision of the Court of Appeals on the question of the sufficiency of these facts to support a mail fraud conviction under *United States* v. *Maze*, *supra*, and the question of the appropriate test under F.R. Crim. P. 31(c) for the giving of a lesser included offense instruction, where there is a possibility of jury hostility to the lesser offense causing conviction of the greater offense in a weak case, *Keeble* v. *United States*, 412 U.S. 205 (1973). The Petition for Writ of Certiorari was filed on February 16, 1988, and the Petition was granted by this Court on May 16, 1988.

SUMMARY OF ARGUMENT

Petitioner's conduct in tampering with odometers was fraudulent and criminal, but it was not furthered by the title registration process required by Wisconsin law. In fact, one of the purposes of title registration is to make it more difficult to get away with frauds and other crimes relating to automobiles, and in the present case the title records were an important link in the investigation and

proof of petitioner's odometer fraud. Mail fraud can only be predicated on mailings which assist the perpetrator to carry out a fraudulent scheme, and not on routine mailings only tangentially related to the fraudulent goal of the scheme.

Petitioner had a right to have the jury consider whether the mailings furthered his scheme or not, but the introduction of evidence regarding his odometer tampering informed the jury of his commission of a crime with which he was not charged, influencing the jury to convict him in a doubtful mail fraud case, rather than let him go free.

The danger that a jury will be influenced by proof of an uncharged crime is the basis for petitioner's right to a lesser included offense instruction. Only by inspecting the allegations of the indictment and the proof at trial can the danger of unfair prejudice be adequately evaluated, so the "inherent relationship" test for a lesser included offense is preferable to the "statutory elements" test, since the "inherent relationship" test is the only test that addresses the actual risk to the petitioner. The "statutory elements" test exalts empty formalism above the reality of unfair prejudice to the petitioner.

ARGUMENT

I. THE MAILING OF AUTOMOBILE TITLE DOCUMENTS TO THE DEPARTMENT OF MOTOR VEHICLES BY THE SUBSEQUENT PURCHASERS OF AUTOMOBILES, IN ORDER TO REGISTER A CHANGE IN TITLE AS REQUIRED BY STATE LAW, DOES NOT JUSTIFY A CHARGE OF MAIL FRAUD GROUNDED ON ODOMETER TAMPERING.

A. To Be Culpable, The Mailings Must Further The Fraudulent Scheme In A Concrete, Articulable Manner.

Petitioner's challenge to the sufficiency of the evidence in this case to sustain his convictions would be dispositive

of this case, if accepted. Intuitively, it is difficult to justify the creation of a mail fraud prosecution out of the raw materials of odometer tampering. However, in *United States* v. *Shryock*, 537 F.2d 207 (5th Cir.), *cert. denied*, 429 U.S. 1100 (1976), and *United States* v. *Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), convictions for mail fraud were sustained on similar facts, on the theory that the odometer tampering scheme had as its ultimate object the sale of the cars to the retail customers, and the mailing of title documents was necessary to consummate these sales. Thus, the court in *Galloway*, *supra*, declared:

> In order to sell his cars at the auction, it was necessary for Galloway to provide the dealer-purchasers, through the auction, with the necessary title documents. In order for the dealer-purchasers to then sell these cars, it was necessary for them to transfer title by mailing these title documents to the appropriate state agency. Only the experience of successful title transfer, therefore, would induce the dealer to return to the auction and purchase other automobiles from Galloway. Any failure in the title application process would have endangered Galloway's scheme by discouraging the retail dealer from making further purchases of his automobiles. 664 F.2d at 164-5.

What these cases fail to recognize is the lack of connection between the odometer tampering and the title registration. While it may be true that the dealers and purchasers of the automobiles would not continue to buy the automobiles if good title were not furnished to them, the fact that the odometer has been rolled back in no way affects the validity of the title conveyed. The opinion in *Galloway* speaks of a possible failure of title transfer as if it were a realistic possibility, without explaining how such a failure would in fact occur.

B. The Mail Fraud Statute Addresses Only Those Mailings Which Aid The Fraudulent Scheme, And Does Not Reach All Mailings Which Occur During The Course Of The Scheme.

The history of the mail fraud statute is a somewhat checkered one; a number of decisions of this Court seem to contradict each other regarding the outer limits of the statute's reach. In *Durland* v. *United States*, 161 U.S. 306 (1896), the Court considered the claim that, since the defendant's scheme did not involve misrepresentations as to past or present facts, it was not properly deemed "fraud". Defendant's scheme consisted in the mailing of solicitations to unknown individuals for investments in a "Tontine Investment" Bond, a sort of pyramid scheme promising future profits. The Court construed his scheme in strong language:

> In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such. 161 U.S. at 314.

The Court, consequently, had no difficulty in finding that the defendant's conduct fell within the intended proscription of the statute:

> It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed. . . . . 161 U.S. at 314.

Durland can be viewed as an instance of conduct violating the core interests protected by the statute; the mailing of something false with the design of receiving money in response.

Around twenty years after *Durland* the Court refined the application of the mail fraud statute in two cases, *United States* v. *Young*, 232 U.S. 155 (1914) and *United States* v. *Kenofskey*, 243 U.S. 440 (1917). In *Young* the defendant raised a challenge to the technical pleading in the indictment, claiming that it did not charge that he planned the use of the mails as an essential part of his scheme, but the Supreme Court upheld the adequacy of the indictment. The scheme in question involved a hardware store whose owners enlisted a broker in procuring loans and investments by the use of false financial statements. The broker was induced by the false information into selling the defendant's notes to banks, soliciting loans, etc. The mailing of false financial reports to the broker, and the response of the broker, the banks and the other investors, fits the traditional pattern of solicitation and response through the mail.

In *United States* v. *Kenofskey*, 243 U.S. 440 (1917), the underlying scheme was the submission of a false death benefits claim by a life insurance agent, which false claim was first handed by the defendant to his local supervisor, then mailed by the supervisor to the parent company, which responded by issuing a check for the claim, which the defendant converted. The Court dealt decisively with the defense that the mailings had not been done by the defendant in person, pointing out that the defendant knew that the insurance company would not pay the claim unless it received the false proofs, and he simply used the supervisor as his agent to accomplish the mailing.

Kann v. *United States*, 323 U.S. 88 (1944), began to draw some limits on the extent of the mail fraud statute. In *Kann*, the officers and directors of a corporation created a subsidiary corporation in order to skim off profits, and a mail fraud prosecution was predicated on the mail-

ing of checks from bank to bank for collection, after the defendants cashed the checks. Although the defendants were admittedly engaged in defrauding the corporation when they cashed the checks, the Court ruled that the statute did not extend to the mailings in question, because the scheme was completed when the defendants received their money:

> The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires. 323 U.S. at 94.

The fraudulent conduct in *Kann* was not within the core protection of the statute;

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other frauds to be dealt with by appropriate state law. 363 U.S. at 95.

C. This Court Must Analyze The Mailings Consistently With The Core Prohibition Of The Mail Fraud Statute.

Ten years after *Kann*, in *Pereira* v. *United States*, 347 U.S. 1 (1954), this Court appeared to depart from this line of analysis. *Pereira* concerned a confidence trickster who romanced and married a wealthy widow in order to persuade her to entrust him with a large sum of money, purportedly for investment, which he then embezzled. The victim of the scheme gave the defendant a $35,000.00 check, drawn on a Los Angeles bank, which the defendant deposited in a bank in El Paso. After waiting for the check to clear through Los Angeles, the El Paso bank paid the

money over to the defendant. The mail fraud prosecution was based on the mailing of the check by the bank from El Paso to Los Angeles, which was necessary before the El Paso bank would pay out any money.

Notwithstanding its ruling in *Kann*, *supra*, which is not discussed in *Pereira*, the Court upheld the conviction, stating that it was not necessary that the defendants contemplate the use of the mails as an essential element of the scheme, and that the defendants caused the use of the mails where it was reasonably foreseeable that a mailing would occur in the ordinary course of business.

The Court cited *United States* v. *Young* and *United States* v. *Kenofskey*, discussed *ante*, as its authority for this ruling. However, in relying on *Young* and *Kenofskey*, the Court went beyond the fact pattern of those cases. As the discussion above demonstrates, both *Young* and *Kenofskey* fit the core pattern of something false being sent through the mail in order to obtain money in response. The check mailed in *Pereira*, like the checks in *Kann*, was the actual fruit of a fraudulent scheme, and the mailing of the check for collection was an ordinary business transaction devoid of falsity. The defendant's gain was realized *because* the check was genuine, not fraudulent.

Still, in *Pereira* this Court decided that collecting the proceeds of the check was an essential part of the scheme, and that the mailing was incidental to that essential part, see 347 U.S. at 8. The practical effect of divorcing the analysis of the application of the mail fraud statute from its core conduct, as occurred in *Pereira*, is to create a mail fraud prosecution out of any fraudulent scheme where a mailing is foreseeable as a normal concomitant of a transaction that is essential to the scheme, including, *e.g.*, selling a car with a rolled-back odometer, or opening a

checking account in order to "kite" checks, *vid. Ohrynowicz* v. *United States*, 542 F.2d 715 (7th Cir.), *cert. denied*, 429 U.S. 1027 (1976), relied on in *United States* v. *Galloway*, *supra*.

A few years after *Pereira* this Court appeared to reaffirm its comment in *Kann* v. *United States*, *supra*, that not all frauds are within the purview of the mail fraud statute, in *Parr* v. *United States*, 363 U.S. 370 (1960). The scheme in *Parr* involved the long term looting of tax revenues from a school district in Texas by members of the school board and other strategically placed persons. The defendants collected the taxes by mail, wrote checks on false invoices, which were cashed and mailed for collection, and bought gasoline for personal use with school district credit cards, which were billed and paid through the mails, but none of these mailings were sufficient to bring their conduct within the statute. The Court pointed out that the tax bills were not alleged to be falsely inflated, that the school board was required by law to impose and collect taxes, and that the admitted crimes that were committed did not bring the case within the core of the statute:

> But the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process. 363 U.S. at 393-94.

The analysis in *Parr* cannot be reconciled with *Pereira*, because *Pereira* did not examine the core prohibitions of the statute in order to determine its proper scope. In subsequent rulings, this Court has adhered to the princi-

ple of determining how the mailings furthered the fraudulent aims of the scheme in deciding the scope of the statute. Thus, in *United States* v. *Sampson*, 371 U.S. 75 (1962), the defendants purported to assist businessmen to obtain loans, using unethical salesmen to make personal contact with prospects and persuade them to pay an advance fee for defendants' assistance. The salesmen would forward the applications and fees to the regional offices of the defendants' corporation, and the regional office would mail a form letter to the victims, giving the appearance that the desired services were being performed. The Court held that these mailings were within the statute, since they promoted the success of the scheme by delaying complaints:

> The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. 371 U.S. at 80-81.

Once again, something false was mailed with the expectation of a specific response furthering that specific fraud.

In *United States* v. *Maze*, 414 U.S. 395 (1974), this Court attempted to reconcile *Parr* and *Kann* with *Pereira*. The defendant in *Maze* was using stolen credit cards to obtain goods and services from motelkeepers. Charges of mail fraud were based on the mailings of sales slips by the motelkeepers to the bank for collection. The Court relied on *Pereira* to find that the defendant "caused" the mailings, since they were reasonably foreseeable, but held that the mailings in *Maze* were not sufficiently closely related to the fraudulent scheme to fall within the statute. The Court distinguished *Pereira* as involving mailings which significantly aided in the acquisition of the

money which was then stolen, whereas the mailings in *Maze* had no effect on the success of the scheme. Although the defendant in *Maze* derived some advantage from the delay inherent in the physical transmission of business correspondence between cities separated by large distances, he had no interest in which of the entities, motelkeeper, rightful card owner, or bank, bore the loss. Once he acquired the goods and services, his scheme was complete.

Thus, in *Maze* this Court adhered to the analysis of whether the fraudulent conduct was furthered by the mailed materials, in order to decide the proper application of the statute.

D. The Purpose Of The Mail Fraud Statute Is To Prohibit The Use Of The Mails To Deprive People Of Their Property By Cunning Schemes.

Recently, in a series of cases, this Court has looked to the aims of the mail fraud statute in defining its scope. *United States* v. *Lane*, 474 U.S. 438 (1986) involved an arson for profit scheme, in which proof of loss claims were submitted that falsely inflated the losses, as well as falsely denying that the defendants had caused the fire. After all payments were received, the defendants submitted additional fabricated invoices, to justify the moneys that they had already received for repair costs. The Court held that the mailing of the fabricated invoices after the receipt of the payments was designed to lull the victims and postpone investigation, just as in *Sampson*, *supra*.

McNally v. *United States*, 483 U.S. ___, 97 L.Ed.2d 292 (1987), overturned years of lower court decisions holding that mail fraud charges could be predicated on the taking of non-property "intangible rights":

> The prosecution's principal theory of the case, which was accepted by the courts below, was that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights", such as the right to have the Commonwealth's affairs conducted honestly. 97 L.Ed.2d at 297.

The legislative history of the mail fraud statute was examined by this Court, supporting the proposition that the core prohibition of the statute is the use of the mails to disseminate falsehoods and reap a harvest from the unwary and greedy:

> The sponsor of the recodification stated, in apparent reference to the anti-fraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property, (footnote)(. . . Representative Farnsworth proceeded to describe a scheme whereby the mail was used to solicit the purchase by greedy and unwary persons of counterfeit bills, which were never delivered . . . .). 97 L.Ed.2d at 300, with footnote 5.

It is significant that in *McNally* itself, the trial court dismissed five counts of mail fraud that were predicated on the mailing of income tax returns, on the authority of *Parr, supra*, that mailings required by law cannot be the basis for liability unless they themselves were false. The only count of mail fraud remaining was based on the mailing of a commission check by an innocent insurance company to the corrupt company involved in the scheme. See footnote 2, 97 L.Ed.2d at 298.

Most recently, in *Carpenter* v. *United States*, 484 U.S. ____, 98 L.Ed.2d 275 (1987), this Court decided that intangible *property* rights were included within the reach of the statute. This well publicized prosecution involved the use of advance knowledge of the contents of a financial advice column in the Wall Street Journal to engage in profitable stock transactions. The primary issue was whether this conduct was a "fraud" on the Journal; affirming the convictions, the Court noted:

> As we observed last Term in McNally, the words "to defraud" in the mail fraud statue have the "common understanding" of "'wronging one in his property rights by dishonest methods or schemes', and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'", (citations omitted). 98 L.Ed.2d at 284.

In dealing with the issue of whether the mails were used to execute the scheme, this Court once again applied the analysis of mailing and response, although the novel feature was that the information in the mailings was not false:

> Lastly, we reject the submission that using the wires and the mail to print and send the Journal to its customers did not satisfy the requirement that those mediums be used to execute the scheme at issue. The courts below were quite right in observing that circulation of the "Heard" column was not only anticipated but an essential part of the scheme. *Had the column not been made available to Journal customers, there would have been no effect on stock prices and no likelihood of profiting from the information leaked by Winans* (emphasis added). 98 L.Ed.2d at 285.

Carpenter thus involved the mailing of information, not false in itself, but implicitly false in that the reader had no

knowledge that prior use was being made of the information for private gain.

E. The Mailings In Petitioner's Case Did Nothing To Aid His Scheme And In Fact Were Used Against Him.

Petitioner's argument in the instant case that the mailings of title documents were not sufficiently closely related to his scheme to support the charge of mail fraud was rejected on the authority of *United States* v. *Galloway, supra*. *Galloway* was wrongly decided, and should be disapproved. As the dissent in *Galloway* points out:

> The mailings did not conceal the fraud, produce profit for Galloway or contribute to the consumer's harm. The mailings resulted from a transaction to which Galloway was not a party and they were routine business mailings the purposes of which were immaterial to Galloway. 664 F.2d at 169 (Swygert, J., dissenting).

Judge Swygert would have applied the holdings in *Maze*, *Kann*, and *Parr*. Insofar as the registration of automobile ownership transfers through the titling process is *mandatory* under the law, the ruling in *Parr* is directly on point, both in *Galloway* and in the present case. The taxes that were embezzled in *Parr* were collected pursuant to the taxing power of the school district, and payment, at least, was compulsory. The use of the mails, however, was convenient, not compulsory:

> In actual operations . . . the assessor-collector would prepare the tax rolls for the current year and therefrom prepare and send out the tax statements by mail, and on receipt of checks in payment of taxes (*the great majority of which were received in the mails*) (emphasis added) would - with exceptions later noted - deposit them to the credit of the District

> in the depository bank, and then mail receipts to the taxpayers. 363 U.S. at 379.

In *United States* v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977), the ruling in *Parr* was constructed to apply to routine mailings regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise, even if the mailings were not required by law. Of course, *Parr* itself dealt with mailings of credit card invoices, as well as tax bills, so not all the routine mailings in *Parr* were required by law, either.

In the present case, petitioner argued that the mailings in question were routine mailings, themselves intrinsically innocent or even counterproductive to his scheme, see Memorandum in Support of Motion for Judgment of Acquittal, Joint Appendix p. 56 - 59, and further that the compulsory nature of title registration laws made it possible for any odometer tampering to be prosecuted for mail fraud, since mailings were bound to occur after the sale of any car with a tampered odometer, see Motion for Judgment of Acquittal or in the Alternative for a New Trial, Joint Appendix p. 62-64.

Petitioner presented one witness in his defense, James Peterson, an investigator for the Wisconsin Department of Transportation with eleven years of experience in investigating complaints against motor vehicle dealers, including odometer tampering. Mr. Peterson was called in support of petitioner's contention that the mailings in question were counterproductive to his scheme. His testimony, which is reproduced in the Joint Appendix at pages 34 to 42, established the following points:

The forms in use in Wisconsin for transferring title at the time of petitioner's activities contained space to report odometer figures (Joint App. p. 35):

That any time you see odometer mileage on any form or statement, it helps in the investigation of odometer tampering (Joint App. p. 37);

That the investigator in petitioner's case used the Department of Transportation records to obtain the addresses of the owners of the automobiles prior to petitioner (Joint App. p. 37);

That the investigator obtained from the previous owners the odometer statements prior to petitioner's (Joint App. p. 38);

That even if the odometer figures are not included in the records, the records are helpful to an investigation if they have the names and addresses of the previous owners (Joint App. p. 38).

This testimony fairly established petitioner's point that title records are maintained for the purpose, *inter alia*, of assisting in the investigation of crimes relating to automobiles, and that the title records in the present case enabled the investigators to follow the automobiles on paper back to the prior owners, and obtain from them proof of petitioner's role in changing the odometers. The same point was brought out by cross-examination of two of the government's witnesses, Ms. Ann Repka, a clerk in the Department of Transportation, and Allan Thompson, an FBI agent. See petitioner's Brief on Appeal, pages 8 - 9 and 13, and Trial Transcript, pages 3 - 23 and 99 - 111.

It was also established, through the testimony of these witnesses, that it is not legal to sell or operate an automobile in Wisconsin that has not had its title registered, and that the sole legal means of registering an automobile title is through the use of Department of Transportation forms, most of which are mailed to the Department as a common business practice. See the testimony of James

Peterson, Joint App. p. 40-41 and testimony of Ann Repka, Trial Transcript pp. 4-5, p. 11.

In short, like the taxes mailed in *Parr*, title registrations are mandatory, and like the credit card slips in *Maze* (which contained the forged signature by the defendant), the title documents (containing the false odometer readings generated by petitioner) were evidence against him. Since title documents by their very nature preserve a record of ownership, petitioner could not avoid leaving tracks, but to claim that the process of leaving tracks assisted or benefited his scheme in any way is nonsensical. Title registration is supposed to deter and hinder fraud, and it is therefor absurd to find that submitting title documents furthered the execution of petitioner's fraudulent scheme.

F. To Uphold Petitioner's Conviction Offends The Plain Meaning Of The Statute.

In *Parr* the Court commented, in *dicta*, on the defendant's claim that the government was seeking an interpretation of the mail fraud law so sweeping in its reach that few, if any, acts of fraud would escape its reach. See 363 U.S. at p. 386. The Court did not find it necessary to rule on that assertion in that case, but the present case raises the same specter: every person who tampers with an odometer for profit intends that the car be sold, and that the title shall be transferred, and is, *ipso facto*, guilty of mail fraud.

The Court of Appeals for the Seventh Circuit was not persuaded by petitioner's arguments in this regard, see the initial panel opinion, reproduced in the Joint App. at p. 69, p. 71:

> Regardless of what the defendant or any reasonable person might conclude upon reading the mail

> fraud statute in isolation, the expansive judicial interpretations of the language, going back many years, must be considered with the text, and leave no doubt that a fraud that foreseeably causes a mailing under the present circumstances is an offense. 776 F.2d at 1370).

Petitioner asserts that both the plain language of the statute, and the precedents of *Kann*, *Parr*, and *Maze*, support his position and require reversal of the Court of Appeals on this point. If prior judicial decisions of lower courts have distorted the plain meaning of the statute, it is the decisions that should yield, not common sense.

II. PETITIONER WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION IN ORDER TO PRESERVE A FAIR AND ACCURATE JURY DETERMINATION OF HIS CASE.

A. The Jury Was Instructed To Consider Whether The Mailings Were In Furtherance Of Petitioner's Scheme Or Not.

The primary issue that petitioner has raised in his defense in this case is whether the mailings with which he is charged can be fairly said to have been in furtherance of his odometer tampering scheme. Even though the District Court rejected his argument that the mailing of automobile title documents to the Department of Motor Vehicles after he had sold the cars could not, as a matter of law, support a mail fraud charge, the District Court did agree with petitioner that the issue was one for the jury to decide. The District Court's order denying petitioner's motion to dismiss the indictment, which appears in the Joint App. at p. 11:

> Defendant is correct in his understanding that a conviction could not stand if it were based upon mailings that did not actually "further" the scheme to defraud. However, that is a matter to be determined at trial. Joint App. p. 11-12.

At the Final Pretrial Conference the District Court denied the government's request that the jury be instructed that the mailings furthered the scheme as a matter of law, and granted petitioner's request that the issue be left to the jury. See the partial transcript of the Final Pretrial Conference at Joint App. p. 19-24, and the Final Pretrial Conference Order:

> Defendant's motion for the giving of an instruction on a lesser included offense was denied. Defendant's motion to let the jury decide whether the mailings in this case further the offense was granted. Joint App. p. 29.

Still later, when the petitioner moved for acquittal at the close of the government's case, the District Court adhered to her position that the question of whether the mailings furthered the scheme was a question for the jury. By sending the question to the jury, the District Court confirmed petitioner's contention that a reasonable argument could be made that the mailings did not further his scheme. As Judge Flaum stated in his dissent to the *en banc* decision in this case:

> The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury. *It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction* (emphasis added). The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the

fraudulent car sale scheme. Because this rational possibility existed based on the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering. 840 F.2d at 394, Joint App. p. 107 - p. 108.

Petitioner wishes to direct this Court's attention to the reasoning of Judge Flaum's dissent regarding the propriety of a broad rule for lesser included offenses when considering "umbrella-like" statutes, like the mail fraud statute, that can be violated in various ways:

> They are exactly the type of offenses for which consideration of lesser offenses is appropriate under Rule 31(c), but it is hard to imagine how any lesser included offense could ever be considered under the elements test, precisely because these "greater" offenses are so broadly defined. The lesser offense, because of its specific nature, will always contain elements not necessary for conviction under the broader statute. It is this exact concern that recently lead a panel of the Tenth Circuit, in three separate opinions, to conclude that both the "elements" test and the "inherent relationship" test are valid, and that the use of each should be dictated by the nature of the individual case (citation omitted). 840 F.2d 391, Joint App. p. 102.

B. The Evidence About Petitioner's Odometer Tampering Influenced The Jury Against Him On The Mail Fraud Charges.

A criminal defendant's right to an instruction on a lesser included offense flows from this Court's concern for fairness to the defendant. In *Keeble* v. *United States*, 412 U.S. 205 (1973), and *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court focused on the impact on the jury of the evidence at trial, and noted the enhanced danger to the defendant of an unwarranted conviction when evidence of the lesser crime is introduced at trial, but the jury is given

only the choice of conviction or acquittal of the more serious crime:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction - in this context or any other - precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction, *Keeble* v. *United States* at 412 U.S. 212 - 213.

The risk to the defendant depends on what the jury actually hears, not on the barren framework of statutory law. Furthermore, the plausibility of the defendant's argument for the lesser offense can only be judged from the evidence. To quote Judge Flaum once more:

> It seems to me inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial, which will always permit the most complete assessment of what instructions the record will support. 840 F.2d 390, Joint App. p. 100.

In the present case, the government worked hard to include evidence about the extent of petitioner's odometer tampering, and the damage it did to unsuspecting consumers. Over the petitioner's objection, FBI agent Thompson testified that petitioner admitted that he had tampered with the odometers on approximately 150 automobiles during his scheme (see Transcript of Final Pretrial Conference p. 7 - p. 8, and Transcript of Trial p. 102). Over the objection of petitioner, the government pre-

sented the testimony of 9 purchasers of cars which petitioner had sold, in order to inform the jury how much trouble and expense petitioner's actions had caused them, (see Transcript of Trial p. 70 - p. 97).

After petitioner's counsel had argued to the jury that his odometer tampering scheme was injured, not furthered, by the mailing of the title documents, the government attorney urged the jury in rebuttal to convict petitioner, or else he would go free:

> What Mr. Salzberg really wants to create for Mr. Schmuck is a perfect world where if he does the crime and it's perfect, no odometer statements go in and nobody complains. He gets away with it.
>
> When, if the other happens, where there is some mileage written in and a few people complain and that leads to an investigation and he's caught, he can just claim that the risk was too great and he obviously wasn't going to cover himself and he obviously shouldn't be convicted and I submit you shouldn't have it both ways. If you do any type of crime, you take the risk and that's what Mr. Schmuck did here. Trial Transcript p. 178 - p. 179.

This highlights the precise danger warned of in *Keeble;* the jury heard extensive evidence of one type of crime, and then was told they had to either convict petitioner of a different, more serious crime, or let him go free. In effect, fraud was committed on the jury, who were never informed that the government could prosecute petitioner for odometer tampering as easily as for mail fraud. In fact, the government brought a successful motion *in limine* to prohibit petitioner's counsel from informing the jury that the government could have prosecuted him for odometer tampering instead of mail fraud, see Trial Transcript p. 143 l. 16 - p. 146 l. 23.

Petitioner explicitly argued in his post trial Motion for Judgment of Acquittal or in the Alternative for a New Trial that the government had been allowed to use jury hostility to odometer tampering to lower its burden of proof, and thus obtain a mail fraud conviction in a weak case, see Joint Appendix p. 62-p. 64. This unfairness could have been most easily cured by the requested lesser included offense instruction on odometer tampering.

C. The Purpose Of Rule 31(c) Is More Appropriately Fulfilled By Considering Allegations In The Indictment And The Evidence At Trial, Rather Than By A Mechanical Comparison Of Statutory Elements.

Prior to its decision in the present case, the Seventh Circuit Court of Appeals had held, in *United States* v. *Stavros*, 597 F.2d 108 (1979), that the propriety of a lesser included offense instruction should be determined by looking at the allegations of the indictment, as well as the statutory elements of the offenses. The *en banc* opinion in the present case concedes that where the statute defining the offense is written in general language capable of wide variation in types of conduct, such as the mail fraud statute, "there is logical appeal for the proposition that the terms of the indictment will narrow the scope of the elements to be examined", 840 F.2d at 386, Joint App. p. 91, but then retreats into an ambiguous statement that "Given the present indictment, however, alleging as one element devising a scheme to defraud purchasers of automobiles with altered odometers, knowingly and willfully causing an odometer to be altered is not identical to the element of having devised the scheme", *id.* This ambiguity only serves to conceal the plain language of the indictment, which alleges, in paragraph 4,

> It was further a part of this scheme that WAYNE T. SCHMUCK would cause the odometer mileage

> reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile. Joint App. p. 4.

As correctly noted in the panel decision, the language of the indictment did satisfy all the elements of the odometer tampering statute, 776 F.2d 1371, Joint App. p. 72. This demonstrates that odometer tampering was inextricably intermixed with the mail fraud charges in this case.

The conflict among the Federal Circuits between the strict statutory elements approach and the "inherent relationship" approach has been the subject of scholarly commentary, which criticizes the strict approach. In an article by Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 Brooklyn L.Rev. 191 (1984), the author states, concerning the elements test:

> What this standard offers to judicial economy, however, it reclaims from jurisprudential policy. It lacks the flexibility to fit the punishment precisely to the crime because it focuses on semantics instead of facts . . . . Moreover, the judicially declared purpose of Rule 31(c) is to permit the parties to react to the proof at trial. It is thus inappropriate for the standard to call for a purely abstract and mechanical assessment in defining the lesser included offenses of a particular crime. 50 Brooklyn L. Rev. 202-203.

Ettinger goes on to point out that the basis for the defendant's right to a lesser included offense has never been clearly articulated, but concludes:

> It might reasonably be said that such a right is fundamental to providing the defendant a fair trial and to preventing the imposition of unduly harsh punishment. Both of these justifications presume that the decision will reflect an accurate assessment

> of the facts arrived at after full consideration of all the relevant evidence, and neither is served by a system that bars deliberation on all of the criminal implications of the case. The right might, therefore, been seen as a constitutionally protected means of upholding the fifth amendment, which seeks to guarantee exactly such justice to the accused . . . . Given that the defendant is entitled to put before the jury every meritorious defense, it seems anomalous to proscribe the introduction of an ameliorative legal theory by denying the defendant a right to a lesser included offense charge, *id.* at 215-216.

Although the "inherent relationship" test results in the defendant's having a greater right than the prosecution to request lesser offense instructions based on the evidence, this abandonment of the doctrine of mutuality (itself a doctrine of less than constitutional dimension) does not in practice impose hardship upon the government:

> The prosecution, with investigative resources far greater than those of most defendants, is the only party with any control over the charge prior to trial. As a result, "in most cases the prosecution can foresee whether the proof is likely to develop strongly favoring a verdict on a lesser included offense, in which event the indictment should so charge, which is the prosecutor's option." The government's failure to make the best use of its earlier advantage should not be construed to affect the nature of the accused's single chance to specify the crime of which he or she may be guilty.
>
> Notice of the charges is the defendant's right, to waive if it becomes expedient to do so . . . . "It is . . . [the accused's] liberty that is at stake, and the worst that can happen to the government under the less rigorous instruction is [the defendant's] readier conviction . . ." (citations omitted), *id.* at 227-228.

The *en banc* opinion in the present case places great weight upon the certainty and predictability of the strict

elements test. Simplicity of use is not a sound reason for adopting a rule that fails to address valid concerns of fairness. The ancient tradition of jury trials in criminal cases is less simple and predictable than other possible methods, but considerations of justice and fairness outweigh the potential saving of time and effort. As the Supreme Court of California pointed out in *People* v. *Geiger*, 35 Cal. 3d 510, 199 Cal. Rptr. 45, 674 P.2d 1303, 50 ALR 4th 1055 (1984), a case which relied upon *Keeble* v. *United States*, supra, *Beck* v. *Alabama*, supra, and *United States* v. *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971):

> The People are deprived of no statutory or constitutional right when, after being afforded that opportunity, the trier of fact concludes that they have not proven the charged offense beyond a reasonable doubt and elects to convict the defendant of a related offense rather than acquitting the defendant who is, after all, guilty of the related offense. 674 P.2d at 1313.

Geiger is the subject of an annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 ALR 4th 1081, which collects state cases in which instructions were requested on lesser offenses that did not have all their statutory elements included in the greater offense charged, but bore a recognizable relation to the greater offense. The propriety of such instructions has been accepted in cases from California, Michigan, Alaska, Colorado, Montana, Nevada, New Jersey, and Utah, and arguably in Illinois, Georgia, Louisiana, and New York. The annotation observes:

> While the argument has been frequently advanced that this violates the doctrine of mutuality between prosecution and defense in a criminal case, the courts recognizing the propriety of the lesser-related offense instruction given at the defendant's request,

> even though the prosecution is never able to make a similar request, appear to feel that the defendant's right to be convicted only of an offense actually committed has a higher priority than any formal concept of mutuality. 50 ALR 4th at 1090.

A comment by Yusem in 84 Dickinson L. Rev. 125 (1979), *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, briefly surveys the various lesser included offense theories applied in the different States, identifying four conceptually distinct treatments of the question, including the pleadings approach, which examines the accusatory pleading, the statutory evidence approach, which examines the evidence at trial, the strict statutory approach, which examines only the statutory elements, and the Model Penal Code approach, which combines the strict statutory approach with a broader "injury to the same interest" approach. The comment points out the illusory nature of the "consistency and predictability" of the strict statutory approach:

> Since this determination is made in the abstract, with reference only to the language of the controlling statutes, theoretically a static number of lesser included offenses exists. Because the theory is conceptual in nature, however, inquiries into the relationship between the two statutes become exercises in statutory interpretation. The test "is not as simple as defining the elements of the two offenses separately and laying them side by side . . ." because borderline situations occur.
>
> Because the statutory approach does not consider factual evidence or pleadings, it is inherently inflexible. A court's interpretation of the language of a statute becomes more important than operative facts and, perhaps, more important than the purpose of

the doctrine as an aid to both the prosecution and defense. 84 Dickinson L.Rev. 129-130.

> The basic problem with the strict statutory approach is its inherent inflexibility. The meaning of words rather than the nature of offenses is the paramount inquiry. This approach subverts the basic function of the doctrine, to aid the prosecution and defense, *id.* at 144.

The asymmetry between the prosecution's right to request a lesser offense instruction and the defendant's right is the unavoidable corollary of the defendant's right to a fair trial, free from the pressure of prejudice. Only an approach that examines the evidence before the jury can adequately protect the defendant against the risk of unwarranted conviction:

> It is, after all, that evidence which would convince the jury the defendant was guilty of some offense, even if something less than the charged offense, and it is therefore that same evidence which gives rise to whatever temptation the jury may feel to convict of the charged offense in spite of a failure of proof as to one or more prerequisites. *United States* v. *Johnson*, 637 F.2d 1224 (9th Cir. 1980) at 1238-1239.

III. CONCLUSION

For the foregoing reasons, the petitioner's conviction of mail fraud must be reversed, and a judgment of acquittal entered, or at least a new trial ordered, with directions to instruct the jury on the lesser included offense of odometer tampering.

Respectfully submitted,

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No. 87-6431

In the Supreme Court of the United States

OCTOBER TERM, 1988

WAYNE T. SCHMUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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37pp

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to convict petitioner on the charges of using the mails for the purpose of executing a scheme to defraud retail purchasers of used cars by turning back odometer readings.

2. Whether the misdemeanor of odometer tampering, 15 U.S.C. 1984 and 1990c, is an "offense necessarily included" (Fed. R. Crim. P. 31(c)) in the offense of mail fraud, 18 U.S.C. 1341, even though not all the elements of odometer tampering are elements of mail fraud.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-6431

WAYNE T. SCHMUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 87-108) is reported at 840 F.2d 384. The opinion of the three-judge panel (J.A. 69-82) is reported at 776 F.2d 1368.

JURISDICTION

The judgment of the court of appeals (J.A. 109-110) was entered on January 21, 1988. The petition for a writ of certiorari was filed on February 16, 1988, and was granted on May 16, 1988 (J.A. 111). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on 12 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 90 days' imprisonment

on Count 1 and four years' probation on the remaining counts (J.A. 65-66). After a divided panel reversed petitioner's convictions (*id.* at 83-84), the court of appeals heard the case en banc and affirmed (*id.* at 110).

1. Petitioner was charged in the indictment with devising a scheme to defraud retail purchasers of used vehicles by turning back odometer readings (J.A. 3-4). The evidence at trial showed that, during 1978 and 1980, petitioner regularly purchased used cars and trucks at auctions in Illinois (Tr. 102). On about 150 occasions, petitioner had a person named "Fred" in Rockford, Illinois, turn back the odometer readings on the used vehicles (*id.* at 102-103). Petitioner then prepared odometer statements based on the new, false readings (*id.* at 103). Petitioner sold some of the vehicles with altered odometer readings to four retail auto dealers in Wisconsin. When they bought the used vehicles from petitioner and resold the vehicles to the public, the four dealers relied on petitioner's representations as to the accuracy of the vehicles' mileage readings (*id.* at 28-29, 34-35, 40-42, 50, 54-58, 68). The four dealers testified that a vehicle's mileage is an important factor in determining the price of a used car (*id.* at 25-26, 32, 52, 66).

The dealers resold the vehicles to Wisconsin customers (J.A. 88). When they made a sale, the dealers mailed a title application on behalf of the purchaser to the Wisconsin Department of Motor Vehicles (Tr. 27-28, 32-33, 59-60, 66-67). A purchaser could not obtain a license plate without a title (*id.* at 33, 59-60, 68-69). Thus, a motor vehicle could not be driven in Wisconsin until a proper title had been issued (*id.* at 4-5). At least two of the dealers told petitioner that they mailed title applications for their retail customers (*id.* at 37, 55, 64). The four dealers mailed the 12 title applications that were charged as the illegal

mailings in the indictment (*id.* at 7-11, 42-44, 59, 66-67, 96-97; GXs 1-12).

Nine retail purchasers—the victims of petitioner's scheme—testified at trial. They all stated that they relied on the false odometer readings when they made their buying decisions (Tr. 74, 77, 80, 82-83, 85, 87, 89, 91, 93, 95-96). The odometer readings on the nine vehicles purchased by those persons had been turned back between 18,000 and 49,000 miles (*id.* at 41, 74-75, 77-78, 80-84, 85, 87, 89, 91-92, 95-96; GXs 1, 3, 5-11; see also Tr. 37-42; GXs 2C, 2D, 4B, 12B).

Petitioner's scheme was discovered after several used car buyers, who suspected that their odometers had been altered, complained to state authorities (Tr. 123). An investigator for the Wisconsin Department of Transportation then checked the histories of the suspect vehicles, which led him to petitioner's business (*id.* at 124). An FBI agent interviewed petitioner, who admitted that he had sold the 12 cars involved in this case and that he had caused the odometer readings on the cars to be turned back (*id.* at 105-106; GXs 1E, 2F, 3D, 4C, 5D, 6C, 7C, 8C, 9B, 10F, 11B, 12C).

2. Prior to trial, petitioner moved to dismiss his indictment on the ground that the mail fraud statute, 18 U.S.C. 1341, did not cover his conduct because the mailings of the title applications did not further the fraudulent scheme. The district court denied that motion. The court held that whether the mailings set forth in the indictment furthered the scheme was a question for the jury. J.A. 11-12.

Petitioner also moved the district court under Fed. R. Crim. P. 31(c) to instruct the jury that it could find petitioner guilty of the misdemeanor of odometer tampering (15 U.S.C. 1984 and 1990c) rather than the felony of mail

fraud (J.A. 14).[1] The trial court denied that motion because, in the court's view, odometer tampering is not a necessarily included offense of mail fraud (*id.* at 28).

At trial, petitioner's lawyer conceded that petitioner had devised and executed a scheme to defraud (Tr. 166, 171, 174). Petitioner's counsel asserted (*id.* at 166-167), however, that the mailings of the title applications did not further petitioner's scheme and thus were not made "for the purpose of executing such scheme" (18 U.S.C. 1341). Petitioner's counsel argued that the title documents assisted the investigation of odometer fraud, because several of the title applications listed the vehicles' odometer readings (Tr. 172-173, 176-177).[2]

The trial court instructed the jury that in order to find petitioner guilty of mail fraud the jury had to find beyond a reasonable doubt that petitioner knowingly devised a scheme to defraud, and that he caused some matter to be sent in the mail for the purpose of executing that scheme (Tr. 189-190). The court also instructed the jury that it need not find that the material sent through the mail was itself false or fraudulent, or that petitioner intended to use the mails to accomplish the fraud (*id.* at 190). The court told the jury that petitioner could be found guilty if the use of the mails was reasonably foreseeable (*id.* at 190-191). The jury returned guilty verdicts on all 12 charges of mail fraud (J.A. 65).

3. A divided panel of the court of appeals reversed and remanded the case for a new trial (J.A. 69-82). Relying on *United States* v. *Galloway*, 664 F.2d 161 (7th Cir. 1981),

[1] In 1986, Congress made odometer tampering a felony. See Truth in Mileage Act of 1986, Pub. L. No. 99-579, § 3(b), 100 Stat. 3311.

[2] An official from the Wisconsin Department of Motor Vehicles testified, however, that the title documents did not contain enough information to reveal that the odometers had been tampered with (Tr. 21-24).

cert. denied, 456 U.S. 1006 (1982), the panel rejected petitioner's claim that he was entitled to a judgment of acquittal because the mailings were not made for the purpose of executing his scheme (J.A. 70-71). But the panel agreed with petitioner that the district court violated Fed. R. Crim. P. 31(c) by failing to instruct the jury that it could find petitioner guilty of odometer tampering rather than mail fraud (J.A. 71-78). The panel applied the "inherent relationship" test to determine whether an offense is "necessarily included" in another offense within the meaning of Rule 31(c) (J.A. 72-73). Under that test, one offense is necessarily included within another when (1) the facts as alleged in the indictment and proved at trial support the inference that the defendant committed the less serious offense, and (2) there is an inherent relationship between the two crimes (*id.* at 73-74). The panel explained that an "inherent relationship" exists when the two offenses "relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense" (*id.* at 73).

Under the inherent relationship test, the panel held that odometer tampering is a necessarily included offense of mail fraud; thus, the district court should have instructed the jury that it could have found petitioner guilty of odometer tampering instead of mail fraud (J.A. 73-74). The panel noted that the fraudulent scheme proved at trial was premised on petitioner's tampering with odometers, and it concluded that there is an inherent relationship between the two offenses—mail fraud and odometer tampering—because "[b]oth offenses protect against the same kind of societal wrong: fraud" (*id.* at 74).[3]

[3] Judge Fairchild dissented on the ground that mail fraud and odometer tampering are not inherently related offenses (J.A. 78-82).

4. The en banc court of appeals vacated the panel decision and affirmed petitioner's convictions (J.A. 85-108). The court held that under Fed. R. Crim. P. 31(c), one offense is necessarily included within another "only when the elements of the lesser offense form a subset of the elements of the charged offense" (J.A. 94 (footnote omitted)). The court concluded that this traditional "elements" test "is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of 'necessarily included' under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy" (J.A. 94-95).[4]

Applying the elements test, the en banc court ruled that mail fraud requires proof that a defendant devised a scheme to defraud and that the mails were used in furtherance of the scheme, but that it is not necessary to show that the scheme was successfully carried out (J.A. 90). The court further observed (*id.* at 91) that the indictment in this case charged that petitioner devised a scheme involving the alteration of odometers but did not allege that he actually altered the odometers. Petitioner thus could have been convicted of mail fraud, as defined by Section 1341 and as described in the indictment, without any proof that he altered an odometer reading (J.A. 91). By contrast, the court noted that odometer tampering under 15 U.S.C. 1984 requires a showing that a defendant knowingly and willfully altered or caused the alteration of an odometer with intent to change the number of miles indicated

[4] The en banc court agreed with the panel that the evidence was sufficient to support the jury's finding that the 12 mailings were made in furtherance of the fraudulent scheme (J.A. 88)

(*ibid.*). For that reason, the court held that odometer tampering is not a lesser included offense of mail fraud and thus affirmed the district court's refusal to instruct on the offense of odometer tampering.[5]

Judges Flaum and Cudahy dissented on the lesser included offense issue. They concluded that it is unreasonable to determine whether a particular offense is "lesser included" solely by reference to its statutory elements: "Permitting consideration of the indictment and succeeding evidence, *in addition* to the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the 'offense charged' in a given case, and of the lesser offenses necessarily subsumed therein" (*id.* at 101) (emphasis in original).

SUMMARY OF ARGUMENT

1. The evidence at trial showed that petitioner used the mails for the purpose of executing his fraudulent scheme, as required by the mail fraud statute. The sale of the vehicles with altered odometers to retail purchasers was an important step in petitioner's scheme. Those sales could be

[5] Because the court read the indictment as not alleging that petitioner had actually tampered with odometers, the court of appeals avoided deciding whether greater and lesser offenses must be compared solely on the basis of their statutory elements, or whether a lesser offense is included within a greater one when the allegations of the indictment state all the elements of the lesser offense, even though the statutory definition of the greater offense does not include all those elements. See J.A. 91, 99. Thus, the court of appeals' narrow holding is that a defendant is not entitled to an instruction on an offense that is not included in either the statutory definition of the charged offense or the allegations of the indictment. We believe, for the reasons stated below (pages 19-30), that the proper test under Rule 31(c) looks to the statutory elements of the two crimes.

accomplished only if the purchasers received a valid title. Thus, petitioner made those sales possible by causing the mailings of 12 title applications on behalf of the retail purchasers. Nothing in the mail fraud statute excludes the 12 mailings from the reach of the statute simply because, in petitioner's words, the mailings may be "routine" or "intrinsically innocent."

Petitioner is wrong, as a matter of fact and law, in asserting that the mailings of title documents were not "for the purpose of executing" his scheme because the documents might have aided investigators in discovering petitioner's fraud. The title documents did not, by themselves, reveal any fraud; rather, the investigation of petitioner's scheme stemmed from complaints by defrauded buyers. In any event, the mail fraud statute does not suggest that a mailing is outside the statute simply because the mailed matter might have the incidental effect of leading to the disclosure and unraveling of the fraud.

The mailings in this case occurred before petitioner's scheme reached fruition. Petitioner's scheme, as charged in the indictment and proved at trial, was to defraud retail customers. Petitioner used dealers as conduits to reach those victims. Petitioner intended dealers to resell the vehicles that he sold to them. Only in that way could petitioner's scheme to defraud the retail customers function on a continuing basis. Accordingly, the mailings of title applications, which allowed the victims to take legal custody of the altered vehicles, were for the purpose of executing petitioner's ongoing fraudulent scheme.

2. Petitioner was not entitled to have the jury instructed that it could find petitioner guilty of odometer tampering rather than mail fraud. An offense is "necessarily included" in another offense within the meaning of Fed. R. Crim. P. 31(c) only if all of the statutory elements of the lesser offense are statutory elements of the

greater offense as well. This "elements" test is supported by the language and history of Rule 31(c). The Rule, which was promulgated in 1944, was intended to adopt the prevailing practice, and the statutory elements test was the governing test in both federal and state courts at that time. This Court's opinions concerning Rule 31(c) have implicitly recognized that the Rule requires a court to compare statutory elements when it considers a request for a lesser included instruction.

In addition to being more faithful to the language, history, and construction of Rule 31(c), the elements test is supported by several strong policy considerations. It is clearer and simpler to apply than the "inherent relationship" test and therefore is far less likely to produce unnecessary litigation in district and appellate courts. It respects the authority of the prosecutor and the grand jury to determine the charges on which a defendant will be indicted and required to stand trial; the "inherent relationship" test, by contrast, authorizes the court to permit a trial and verdict on a charge not brought by the grand jury and not among the lesser included offenses selected by Congress. And the elements test is consistent with the test this Court applies in the double jeopardy area, a closely analogous field, where one offense is deemed to be "necessarily included" within another only if the statutory elements of one are included within the statutory elements of the other.

ARGUMENT

I. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT PETITIONER USED THE MAILS FOR THE PURPOSE OF EXECUTING HIS FRAUDULENT SCHEME

Petitioner does not argue that the district court erroneously instructed the jury on the crime of mail fraud. Nor does he challenge the jury's findings that he devised a

scheme to defraud and that he caused the 12 mailings charged in this case. Instead, petitioner contends that he was improperly convicted of mail fraud because "the mailings in question were routine mailings, themselves intrinsically innocent or even counterproductive to his scheme" (Br. 21). The "routineness" or "intrinsic innocence" of the mailings, however, is no defense to a charge of mail fraud. What the evidence in this case showed—and what the mail fraud statute requires—is that the mailings were done for the purpose of executing petitioner's fraudulent scheme.

A. The Federal Mail Fraud Statute Applies Even To Routine Mailings That Are Not Intrinsically False Or Misleading

The federal mail fraud statute (18 U.S.C. 1341) renders unlawful any mailing that is made "for the purpose of executing [a fraudulent] scheme." *Kann* v. *United States*, 323 U.S. 88, 94 (1944). As this Court noted in *Pereira* v. *United States*, 347 U.S. 1, 8 (1954), "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element" of the fraud. It is well settled that mailings can be illegal under the statute even if they are "innocent in themselves." *Parr* v. *United States*, 363 U.S. 370, 390 (1960). See, *e.g.*, *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), slip op. 9 (mailings of newspaper that did not contain false statements were for the purpose of executing a fraudulent scheme); *United States* v. *Bernhardt*, 840 F.2d 1441, 1445-1447 (9th Cir. 1988); *United States* v. *Clark*, 649 F.2d 534, 540-542 (7th Cir. 1981).

Similarly, as the courts of appeals have uniformly held, mailings are not beyond the reach of the mail fraud statute simply because, in petitioner's words, they are "routine mailings" (Pet. Br. 21). See, *e.g.*, *United States* v. *Bernhardt*, 840 F.2d at 1446-1447 (mortgage payments); *United States* v. *Green*, 786 F.2d 247, 248-250 (7th Cir. 1986)

(accident reports mailed by police officer); *United States* v. *Mitchell*, 744 F.2d 701, 703-704 (9th Cir. 1984) (mailings by city council relating to condominium conversion); *United States* v. *Primrose*, 718 F.2d 1484, 1490-1491 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984) (affidavit required by state law); *United States* v. *Bright*, 588 F.2d 504, 509-510 (5th Cir.), cert. denied, 440 U.S. 972 (1979) (mailings of notices to creditors by lawyers probating will). Indeed, it is hard to imagine a more "routine" mailing than the mailing of copies of the Wall Street Journal to Journal customers that constituted the unlawful mailings in *Carpenter* v. *United States*, *supra*, or the mailings of confirmation letters to defrauded customers that served as the unlawful mailings in *United States* v. *Sampson*, 371 U.S. 75 (1962). Yet in both cases this Court held that those mailings formed the basis for valid mail fraud charges.

B. The Mailings Of The Title Applications Were Incident To An Essential Step In The Scheme

1. A mailing is for the purpose of executing a fraudulent scheme if it is "a step in [the] plot" (*Badders* v. *United States*, 240 U.S. 391, 394 (1916)) or "incident to an essential part of the scheme" (*Pereira* v. *United States*, 347 U.S. at 8). Accord *Parr* v. *United States*, 363 U.S. at 391. The jury in this case was entitled to find that the mailings of the 12 title applications that were charged in the indictment were "incident to an essential part" of petitioner's scheme, because the mailings occurred in connection with an important step in the fraud.

The indictment alleged that petitioner devised a scheme, which operated from July 1, 1979, through July 10, 1980, to defraud retail purchasers of automobiles in Wisconsin (J.A. 3). As part of that scheme, petitioner sold automobiles with false odometer readings to certain Wisconsin

dealers who in turn—and without knowledge of the false readings—sold the vehicles to the retail purchasers, the victims of the scheme (*id.* at 4-5). In order to make the sales to retail purchasers, the dealers mailed title applications on behalf of their customers to the Wisconsin Department of Transportation (Tr. 33, 59-60, 68-69). The indictment alleged and the evidence proved 12 such mailings between July 25, 1979, and July 2, 1980 (J.A. 89).

The object of petitioner's scheme, as charged in the indictment and proved at trial, was to defraud the retail purchasers of used cars, not the dealers who bought the cars directly from petitioner.[6] The sale of the vehicles to the retail customers was thus a necessary step in petitioner's scheme. In order to complete the fraudulent transaction, petitioner had to ensure that the retail customers would purchase petitioner's cars without realizing that the odometers on those cars had been tampered with. And the evidence was undisputed that the dealers could not complete a retail sale unless they sent a title application to the Wisconsin Department of Transportation.

The dealers were simply the innocent conduits by which petitioner reached the defrauded purchasers in the retail market. Petitioner used the dealers as unwitting assistants in his scheme, and the dealers used the mails to complete the fraudulent sales to the retail purchasers. Because the mailings permitted the retail sales to be completed, the mailings contributed to the success of the scheme. Without

[6] It is plain, as petitioner's counsel acknowledged at trial (Tr. 171), that it was the retail purchasers who suffered from petitioner's scheme, as they testified that they based their purchase decisions in part on the false odometer readings. The dealers did not suffer direct economic harm, because they unwittingly bought and sold the vehicles at an inflated price based on the apparently low mileage on the cars.

the expectation that they could resell the used vehicles, the dealers would not have bought the vehicles from petitioner in the first place and certainly would not have made repeat purchases from petitioner.[7] It is therefore inaccurate to suggest that petitioner's interest in the series of transactions ended as soon as he received payment from the dealers, and before the dealers made the subsequent sales to their retail customers. For that reason, as the courts of appeals have uniformly held in similar cases, a dealer's act of mailing title documents on behalf of a defrauded purchaser furthers the execution of an odometer tampering scheme. See, *e.g, United States* v. *Locklear*, 829 F.2d 1314, 1318-1319 (4th Cir. 1987); *United States* v. *Fallon*, 776 F.2d 727, 729-731 (7th Cir. 1985); *United States* v. *Galloway*, 664 F.2d 161, 163-165 (7th Cir. 1981), cert. denied, 456 U.S. 1006 (1982); *United States* v. *Shryock*, 537 F.2d 207, 208-209 (5th Cir.), cert. denied, 429 U.S. 1100 (1976). See also *United States* v. *Henson*, No. 87-5132 (6th Cir. June 15, 1988), slip op. 7-10.

2. Petitioner asserts (as he did to the jury) that the mailings were not in furtherance of his scheme, because the title records might have aided investigators in discovering the fraud (Br. 20-23). That contention is without merit, both factually and legally.

As a factual matter, the evidence showed that petitioner's scheme was not discovered as a result of information contained in the dealers' title applications. Although the records of the Wisconsin Department of Transportation were used to obtain the names and addresses of previous owners of the altered vehicles, wit-

[7] Petitioner's scheme was quite extensive; it involved roughly 150 automobiles (Tr. 102), and several of the dealers had repeated dealings with petitioner (Tr. 33, 54).

nesses from the Department testified that petitioner's fraud could not be discovered from examining the title documents (Tr. 125-126). At the time of petitioner's scheme (1979 to 1980), Wisconsin did not require odometer readings to be included on title applications, and the applications did not include a statement from the previous owner about the car's mileage. In fact, petitioner's own witness testified that the investigation in this case stemmed from complaints by defrauded buyers, not from a review of title documents (Tr. 123).

As a legal matter, the case would not stand differently even if the information in the title applications had led directly to petitioner's apprehension. The mail fraud statute does not suggest that a mailing is outside the statute simply because the mailing might aid investigators in uncovering or proving the existence of the scheme. Many documents that are mailed in furtherance of a fraudulent scheme also carry the potential of "leaving tracks" (Pet. Br. 23). See, *e.g.*, *United States* v. *Dowling*, 739 F.2d 1445, 1450-1451 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985); *United States* v. *Gorny*, 732 F.2d 597 (7th Cir. 1984). As the courts of appeals have held, such documents may nevertheless be found to be for the purpose of "executing the scheme" if, as here, they serve the purpose of helping to promote the overall fraudulent plan. See *United States* v. *Serino*, 835 F.2d 924, 929 (1st Cir. 1987).

At bottom, petitioner's argument apparently is that the mailings did not further his scheme because he would have preferred to operate in a world without title-registration laws. Petitioner states (Br. 23) that title registration "is supposed to deter and hinder fraud." Undoubtedly, petitioner is correct that his scheme to defraud retail purchasers would not have been harmed (and may have been

aided) by the absence of a title-registration law. But such a law was in place at the time petitioner devised his scheme, and the success of petitioner's scheme depended on compliance with that law. Therefore, it was reasonable for the jury to conclude that the mailing of the applications helped execute the scheme, even though the information on the applications might ultimately be of use in the fraud investigation.

3. In three cases during the past 50 years, this Court has held that particular mailings did not satisfy the "executing the scheme" requirement of the mail fraud statute. In each of those cases—*Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960); and *United States* v. *Maze*, 414 U.S. 395 (1974)—the Court focused on the scope of the particular fraudulent scheme at issue. The Court concluded that the fraudulent schemes in each of those cases had come to an end before the point at which the mailing occurred, and that the mailing therefore did not serve to execute the scheme.

In the first of those cases, *Kann* v. *United States, supra*, the defendants obtained funds that were diverted from the company for which they worked to a second company in which they had a hidden interest. After the payments were made to the second company, the checks by which the payments were made were sent through the mails for collection to banks in another state. This Court reversed the mail fraud convictions that were based on those mailings, on the ground that the mailings of checks between banks occurred after the defendants' schemes "had reached fruition" (323 U.S. at 94). The Court held that on the facts of that case, the mailings that occurred after the defendants had obtained their money were immaterial to the success of the scheme and thus could not be "for the purpose of executing the scheme" (*ibid.*).

The Court applied the same principle in *Parr* v. *United States, supra*. There, the Court found that the mailings on which the prosecution relied to establish two separate mail fraud schemes were not sufficient to prove a federal offense, because in both cases the mailings occurred outside the scope of the fraudulent scheme. The two charged schemes were the misappropriation of school district tax revenues and the misuse of the school district's oil company credit card for private purposes. In the case of the first scheme, the Court found that the mailing of the tax statements, checks, and receipts was not within the scope of the fraud, because there was no allegation or proof that a part of the defendants' scheme was to increase the amount of the tax levied in order to generate funds to be embezzled. 363 U.S. at 387. In the case of the second scheme, the Court concluded that the mailings between the oil company and the school district were not within the scope of the defendants' scheme because the scheme reached fruition when the defendants obtained the goods and services that they misappropriated; it was immaterial to the defendants, the Court concluded, how (or whether) the oil company received payment for those services. 363 U.S. at 393.

Finally, in *United States* v. *Maze, supra*, the Court reversed a mail fraud conviction where the defendant had used a stolen credit card to obtain services from motel owners. The mailings that formed the basis of the charges were sales slips that were mailed from the motels to the issuing bank, and ultimately to the owner of the credit card, for payment. The Court held that Maze's "scheme reached fruition when he checked out of the motel," and that the mailings among the several victims were immaterial to the success of his scheme (414 U.S. at 402).

In each of those cases, the Court found that the scheme either had ended (or had not begun in the case of one of

the schemes in *Parr*) at the time when the charged mailings occurred. By contrast, this Court has upheld convictions when the mailings occurred while the scheme was still in progress, either because the funds that were the object of the fraud had not yet been obtained (*Pereira* v. *United States, supra*), or because the mailings " 'were designed to lull the victims into a false sense of security [in order to] make the apprehension of the defendants less likely' " (*United States* v. *Lane*, 474 U.S. 438, 451-452 (1986) (citation omitted); see also *United States* v. *Sampson*, 371 U.S. at 81). And in *Sampson* the Court expressly declined to adopt the position that the use of the mails could not be "for the purpose of executing [a] scheme" if the mailings occurred "after the victims' money had been obtained." *Id.* at 80. The Court characterized the *Kann* and *Parr* cases as holding "only that under the facts in those cases the schemes had been fully executed before the mails were used" (*ibid.*).

At the time that the mailings occurred in this case, petitioner had received money from the dealers, but his fraudulent scheme had not "reached fruition" because the sales to the customers were not completed. Unlike the adjusting of accounts among financial institutions that was involved in *Kann, Parr,* and *Maze*, the obtaining of titles in this case was part of the process of transferring the cars to an unsuspecting customer, which was the very means by which petitioner intended to and did profit from his scheme. Unlike the defendant in *Maze*, who was indifferent to whether the motels ever mailed the credit card receipts for payment to the credit card company, the jury here could reasonably find that petitioner benefited from the issuance of the titles. If the titles were not issued, the sales could not be made, and petitioner's continuing business with the dealers would rapidly come to a halt.

By providing the means by which the victims could take legal custody of the cars, the issuance of titles made it possible for the petitioner's scheme to succeed, with the victims none the wiser.

The mailing of the title applications is analogous to the post-payment mailings in both *Sampson* and *Lane*. In *Sampson*, the defendants mailed letters to the victims after receiving payment from them, assuring the victims "that the promised services would be performed" (371 U.S. at 81). And in *Lane*, the defendants caused a proof-of-loss statement to be mailed to the insurer after they had received the proceeds of their fraudulent insurance claim; the Court held that the post-payment mailing in that case was intended to continue the appearance of normalcy regarding the claim, so as to avoid arousing the insurer's suspicions. The same analysis applies here. Obtaining a title for a retail purchaser, which petitioner's "scheme contemplated from the start" (*Sampson*, 371 U.S. at 80), gave the transaction the appearance of legitimacy and thus served to reduce the risk of investigation and discovery.

Although the title application in each case was mailed by a dealer, who was not a party to petitioner's fraud, the same was true in *Lane*, where the mailing was done by an insurance adjuster who was not shown to have been a party to the insurance fraud. And the same result would have obtained in *Sampson* even if the "lulling" acceptance letters had been sent out by a third party, contracting with the defendants, who believed in good faith that the defendants intended to provide the promised services. In each case, it was enough that the mailing was caused by the defendant and was material in some way to the defendants' effort to make the scheme succeed.

Significantly, both *Sampson* and *Lane* emphasized that in analyzing the question whether a particular mailing was

"for the purpose of executing" a fraudulent scheme, it is essential to examine the scope of the scheme alleged in the indictment. See *Lane*, 474 U.S. at 453; *Sampson*, 371 U.S. at 80. In both of those cases, the indictments alleged fraudulent schemes that included fraudulent conduct occurring after the defendants actually received the victims' money, and the evidence at trial supported the scope of the scheme alleged. In this case, as we have noted, the scheme alleged in the indictment and proved at trial was not to defraud the dealers; it was to defraud the retail customers, and that fraud ended only with the customers' obtaining the titles and legal custody of the vehicles. Accordingly, the jury was entitled to find that the mailings of the 12 title applications were "incident to an essential part" of petitioner's fraudulent scheme (*Pereira* v. *United States*, 347 U.S. at 8).

II. PETITIONER WAS NOT ENTITLED TO AN INSTRUCTION ON THE OFFENSE OF ODOMETER TAMPERING

Petitioner next argues that the district court should have instructed the jury that it could find petitioner guilty of odometer tampering (15 U.S.C. 1984, 1990c) instead of mail fraud. He claims that he was entitled to such an instruction under Fed. R. Crim. P. 31(c) because, on the facts of this case, odometer tampering must be regarded as a lesser included offense of mail fraud. Petitioner's contention is wrong. One offense is "necessarily included" in another for purposes of Rule 31(c) only if all of the statutory elements of the lesser offense are elements of the greater offense as well.[8] And in this case, mail fraud and

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[8] Satisfaction of the elements test is a necessary, but not always a sufficient characteristic of a lesser included offense. As the Court has suggested in the double jeopardy context (see *Garrett* v. *United States*,

odometer tampering each have elements that are not common to the other.[9]

1. A jury at common law was allowed to find a defendant "guilty of any lesser offense necessarily included in the offense charged." *Beck* v. *Alabama*, 447 U.S. 625, 633 (1980) (footnote omitted). By 1772, English juries could return a guilty verdict on an offense consisting of some, but not all, of the elements of the crime for which the defendant was brought to trial. See, *e.g.*, *Rex* v. *Withal & Overend*, 168 Eng. Rep. 146, 1 Leach 88 (1772). As this Court noted in *Beck* v. *Alabama*, that practice "developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged" (447 U.S. at 633).

In 1872, Congress adopted the common law practice for federal criminal trials when it passed the Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198. That Act provided that "in all criminal causes the defendant may be found

471 U.S. 773 (1985)), an offense is not a lesser included offense under Rule 31(c) if Congress intended to create separate offenses, even though the elements test is satisfied. Thus, in the case of complex criminal statutes such as the federal racketeering (RICO) statute, 18 U.S.C. 1961 *et seq.*, and the continuing criminal enterprise (CCE) statute, 21 U.S.C. 848, which require the proof of multiple predicate crimes as an element of the RICO or CCE violation, the predicate crimes are not considered lesser included offenses of the RICO or CCE violations simply because they appear to satisfy the elements test. It is not necessary for the Court to address cases of that kind here, because in this case there is no dispute that, under the elements test, odometer tampering is not necessarily included in mail fraud.

[9] Indeed, the two offenses have no elements in common. Odometer tampering requires proof that the defendant altered the odometer on an automobile with intent to change the number of miles indicated, while mail fraud requires proof that the defendant, having devised a scheme to defraud, caused a letter to be mailed for the purpose of executing the scheme.

guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment." The federal courts operated under that statute until 1944 when this Court adopted Rule 31(c). That Rule, which has not been amended, states that a "defendant may be found guilty of an offense necessarily included in the offense charged." The Notes of the Advisory Committee observe that Rule 31(c) was intended to be "a restatement of existing law." See *Keeble* v. *United States*, 412 U.S. 205, 208 n.6 (1973). Thus, the meaning of "an offense necessarily included in the offense charged" is derived by reference to the practice prevailing at the time.

In *Stevenson* v. *United States*, 162 U.S. 313 (1896), the Court considered a claim that the jury in a criminal trial for murder should have been instructed that it could find the defendant guilty of manslaughter. After quoting the Act of June 1, 1872, the Court compared the statutory elements of murder and manslaughter. The Court observed that murder is the unlawful killing of a person with malice whereas manslaughter is the "felonious killing of another without any malice" (162 U.S. at 320). Thus, the Court noted that the elements of manslaughter are the same as the elements of murder except for the "absence of * * * malice" (*ibid.*). Because manslaughter was a necessarily included offense of murder and because the issue of malice was fairly disputed by the evidence at trial, the Court held that the jury should have been instructed "to say whether the crime was murder or manslaugter" (*id.* at 323).[10]

[10] This Court, under Rule 31(c), has reaffirmed the practice of instructing a jury on a lesser included offense only if the evidence reasonably justifies a finding of guilt on the lesser offense but not on the greater. See *Berra* v. *United States*, 351 U.S. 131 (1956).

The *Stevenson* approach to necessarily included offenses—*i.e.*, comparing the statutory elements of two crimes—continued until this Court's adoption of Rule 31(c). State courts in the half century preceding the adoption of Rule 31(c) consistently applied the "elements tests" in determining whether one crime was a lesser included offense of another. See *Bolling* v. *State*, 98 Ala. 80, 83, 12 So. 782, 783 (1893) ("in every charge of larceny from a storehouse, there is necessarily [included the charge of] simple larceny"); *People* v. *Kerrick*, 144 Cal. 46, 47, 77 P. 711, 712 (1904) ("To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof."); *State* v. *Marshall*, 206 Iowa 373, 375, 220 N.W. 106, 106 (1928) ("if certain elements are necessary to a criminal charge, and these elements plus certain other elements, make the necessary elements of a higher crime, then the lower crime is included in the higher one"); *State* v. *Henry*, 98 Me. 561, 564, 57 A. 891, 892 (1904) ("a practically universal rule prevails, that the verdict may be for a lesser crime which is included in a greater charged in the indictment, the test being that the evidence required to establish the greater would prove the lesser offense as a necessary element"); *People* v. *Martin*, 293 N.Y. 361, 364, 57 N.E.2d 53, 55 (1944) ("The crime of grand larceny is not necessarily included, for some essential elements of that crime are not essential elements in the crime charged").

In *Giles* v. *United States*, 144 F.2d 860 (9th Cir. 1944), which was decided only three months before the adoption of Rule 31(c), the court explained "the character of a lesser offense on which an instruction is warranted" (144 F.2d at 861). The court stated: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the

lesser" (*ibid.* (citation omitted)). Applying this test, the court held that the crime of "pointing firearms" at a person is not included in the crime of negligent homicide. The court compared the two crimes and noted that the " '[p]ointing firearms' " statute has the element of "intentional 'pointing'," which is not an element of negligent homicide (*ibid.*) (citation omitted)).

In sum, the test for determining whether a crime is necessarily included in another crime so that the jury may convict on the lesser crime was well settled in 1944: a crime is necessarily included in a greater crime only if all of its statutory elements are also elements of the greater offense. Rule 31(c) adopted that "practically universal rule" (*State* v. *Henry*, 98 Me. at 564, 57 A. at 892) at the time it was adopted with the express purpose of codifying pre-existing law.

The federal courts faithfully applied the elements test for years following the adoption of Rule 31(c). See, *e.g.*, *Kelly* v. *United States*, 370 F.2d 227 (D.C. Cir. 1966), cert. denied, 388 U.S. 913 (1967); *Larson* v. *United States*, 296 F.2d 80, 81 (10th Cir. 1961); *United States* v. *Barbeau*, 92 F. Supp. 196, 200 (D. Alaska 1950), aff'd, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968 (1952). Although this Court has not construed the term "necessarily included" since it promulgated Rule 31(c), the Court's opinions in cases involving that Rule have focused on the statutory elements of the crimes. For example, in *Berra* v. *United States*, 351 U.S. 131 (1956), the Court stated: "[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense" (*id.* at 134). The Court applied that principle in *Sansone* v. *United States*, 380 U.S. 343 (1965), when it reviewed a claim by a defendant charged with evading income taxes that the jury should have been

allowed to find him guilty of failing to pay a tax when due. The Court compared the statutory elements of the two crimes (*id.* at 351) and concluded that the crime of failing to pay a tax when due is a "lesser-included offense," because the crime of tax evasion simply requires the additional element of "an affirmative act constituting an evasion" (*ibid.*). Hence, the implicit understanding of the Court in *Berra* and *Sansone* was that Rule 31(c) requires a court to compare statutory elements when it considers a request for a lesser included offense instruction.

In 1971, the District of Columbia Circuit departed from its prior precedent (*e.g., Kelly* v. *United States, supra*) and abandoned the elements test. In *United States* v. *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), the court adopted an approach under Rule 31(c) that looks to the evidence presented at trial. Under the *Whitaker* analysis, which petitioner advocates (Br. 32), a defendant is entitled to a lesser included offense instruction if the evidence shows that he may have committed a crime different from the one charged, as long as the uncharged crime and the crime charged in the indictment have some " 'inherent' relationship" (447 F.2d at 319) (footnote omitted). The courts that have followed *Whitaker* have defined the " 'inherent' relationship" to mean that the two offenses "must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." *Whitaker*, 447 F.2d at 319; *United States* v. *Stolarz*, 550 F.2d 488, 491 (9th Cir.), cert. denied, 434 U.S. 851 (1977); *United States* v. *Pino*, 606 F.2d 908, 916 (10th Cir. 1979).

2. The "inherent relationship" test should not be adopted by this Court for a variety of reasons. First, the inherent relationship test departs from the original and well settled meaning of Rule 31(c). As we have noted, the

"elements" test was the prevailing view at the time Rule 31(c) was adopted, and the Rule was designed to codify the current practice. Moreover, the language of the Rule, although not conclusive, supports the "elements" test. In particular, the term "necessarily included" strongly suggests that it is the elements of the two crimes that must be consulted, not the evidence that may develop at a particular trial.

The structure of the Rule is also inconsistent with the "inherent relationship" test. The Rule by its terms does not create a right of the defendant or the government. It simply provides that the defendant "may be found guilty of" a lesser included offense. That language suggests that if a particular offense is a lesser included offense, the jury can be instructed on that offense, whether the instruction is requested by the prosecution or the defense. Yet as petitioner concedes (Br. 31), adoption of the "inherent relationship" test would require the abandonment of mutuality under the Rule: although the defendant could request a lesser included offense charge on an offense established by the evidence, constitutional problems of notice and the right to an indictment by a grand jury could deny the government the right to request an instruction on the same offense. See *Stirone* v. *United States*, 361 U.S. 212 (1960). Thus, although Rule 31(c) appears to contemplate that either party may seek a lesser included offense instruction, the adoption of the "inherent relationship" test would prevent the Rule from being applied in that manner.

Second, the traditional statutory elements test has the virtue of being clearer and simpler to apply than the inherent relationship test favored by petitioner. Because it requires that the statutes be compared in the abstract and does not involve the inferences that might reasonably be drawn from the evidence at trial, the elements test makes it possible to predict before trial the offenses on which the

jury will be instructed, enabling both sides to plan their strategies. And because it does not turn on easily contestable factors such as what the evidence at trial showed and whether two offenses are "inherently related" in light of the proof at trial, the elements test should also minimize litigation, both before the district court and on appeal, over whether a lesser included offense instruction should have been given in a particular case.

This case presents a good example of the confusion that the "inherent relationship" test can create. Although the three-judge panel on appeal was applying the "inherent relationship" test, the dissenting judge on the panel concluded that the odometer fraud and mail fraud statutes were not sufficiently related on the facts of this case to require that the jury be instructed on odometer fraud as a lesser included offense. In light of the amorphous nature of the inquiry into whether the two offenses serve sufficiently similar purposes to be deemed "related," it is hardly surprising that courts would find the concept of "inherent relationship" difficult to apply.

Third, because it permits the jury to consider only the crime listed in the indictment (or one containing all the same elements as the charged crime), the statutory elements test accords with this Court's recognition that the responsibility for selecting the statute under which the accused will be prosecuted falls to the prosecutor and the grand jury. As this Court has stated repeatedly, "[t]he Government * * * is responsible for initiating a criminal prosecution, and subject to applicable constitutional limitations it is entitled to choose those offenses for which it wishes to indict." *Garrett* v. *United States,* 471 U.S. 773, 790 n.2 (1985). Accord *Ball* v. *United States,* 470 U.S. 856, 859 (1985); *United States* v. *Batchelder,* 442 U.S. 114 (1979). If the grand jury wishes to charge the defendant with two closely related offenses, it is free to do so. But when a court decides, at the end of the case, to instruct the jury on a crime *not* charged in the indictment, simply

because that crime is closely related to the crime that *was* charged, the court is preempting the grand jury's role in determining the scope of the indictment. Under the inherent relationship test, the court is given the authority to decide whether some other uncharged offense would appear to fit the evidence in the case as the jury might view it. As a result, the defendant may end up being subject to trial and conviction on a charge that the grand jury did not contemplate, or even one on which it expressly declined to indict.

Fourth, the statutory elements test is consistent with this Court's teachings in the closely related context of double jeopardy law. Under the Double Jeopardy Clause, the Court has held that an offense is included in a greater offense only if it is "invariably true [that] the lesser offense * * * requires no proof beyond that which is required for conviction of the greater." *Brown* v. *Ohio,* 432 U.S. 161, 168 (1977). As the Court noted in *Brown,* "[t]his test emphasizes the elements of the two crimes" (*id.* at 166). And the Court has compared statutory elements—*i.e.*, "whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States,* 284 U.S. 299, 304 (1932))—as a guide in determining whether Congress intended the violation of two statutes to be punished cumulatively. See *Albernaz* v. *United States,* 450 U.S. 333, 337 (1981).

The determination whether two crimes constitute separate offenses for double jeopardy purposes is closely related to the determination whether two crimes constitute separate offenses for purposes of the lesser included offense inquiry. That point is perhaps best made by this Court's decision in *United States* v. *Woodward,* 469 U.S.

105 (1985). In that case, the court of appeals refused to permit separate judgments and cumulative sentences to be imposed for violations of the federal false statement statute, 18 U.S.C. 1001, and the statute that made it a crime for a person to fail to report that he was carrying more than $5,000 into the country, 31 U.S.C. (1976 ed.) 1058, 1101. This Court reversed and permitted the separate judgments and sentences to stand. The Court explained that the court of appeals had incorrectly concluded that the false statement felony was a lesser included offense of the currency reporting misdemeanor.

Although the Court in *Woodward* was focusing on the issue of separate punishment, the Court's analysis is instructive. Using precisely the same term that is found in Rule 31(c), the Court held that under a proper application of the statutory elements test, the currency reporting violation does not "necessarily include" proof of a false statement offense (469 U.S. at 108). For that reason, the Court held, the court of appeals was wrong in finding that the false statement felony was a lesser included offense of the currency reporting misdemeanor. If the statutory elements test is the proper one for finding lesser included offenses in the sentencing context, there is no reason to suppose that the test should be any different in the context of jury instructions.

Finally, contrary to petitioner's assertion, there is no unfairness in refusing to give a lesser included offense instruction in a case such as this one. A jury instruction on a lesser included offense does not, in the abstract, favor either the government or the defendant; instead, it "has its dangers—to both sides." *United States* v. *Tsanas*, 572 F.2d 340, 345 (2d Cir.), cert. denied, 435 U.S. 995 (1978). While the absence of a lesser included offense as an alternative for the jury may induce the jury to convict on the greater

charge, particularly in cases involving violence or otherwise having strong emotional overtones, see *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980); *Keeble* v. *United States*, 412 U.S. 205, 213 (1973), it may also lead to an outright acquittal where the jury is unable to find all the elements of the greater offense present, but would have convicted the defendant of a less demanding offense. Indeed, the double-edged character of the issue is underscored in this case by the irony that if petitioner wins on his challenge to the sufficiency of the evidence of mail fraud, he will no doubt be gratified that the jury was not given a lesser included offense instruction on odometer tampering, to which he admitted at trial he had no defense. It is therefore by no means clear that, as a general matter, the "inherent relationship" test is more favorable to defendants than the "elements" test; *a fortiori*, it is unclear that the inherent relationship test is any "fairer" than the traditional approach.

In assessing the relative merits of the two competing tests, it is important to keep in mind that the choice is not between a system containing lesser included offenses and one containing no lesser included offenses at all. The elements test preserves intact traditional lesser included offenses, such as the lesser degrees of homicide (see 18 U.S.C. (& Supp. IV) 1111, 1112) and the lesser degrees of armed bank robbery (see 18 U.S.C. (& Supp. IV) 2113). In those instances, where the legislature has intentionally created a set of lesser included offenses, it may be that the enhancement of the accuracy of jury verdicts outweighs the risks of jury confusion and compromise. But where the defendant seeks a lesser included offense instruction on a statute that was not charged in the indictment and may have altogether different elements from the charged offense, the possibility of "enhanced accuracy" in the verdict is outweighed not only by the possibility of jury con-

fusion, but also by the interest in having a verdict on the charge selected by the grand jury as the appropriate vehicle for the defendant's prosecution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WAYNE T. SCHMUCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

I. THE MAILING OF TITLE DOCUMENTS WAS COUNTERPRODUCTIVE TO PETITIONER'S SCHEME.

Petitioner was involved in an odometer tampering scheme whereby, as the government concedes, he deceived both used car dealers and used car purchasers about the actual mileage of the cars he sold. (See government's brief p. 2 *et. passim).* The only connection between petitioner's deceptive odometer tampering and the use of the United States Mails was that after petitioner sold each car, the used car dealer resold it to the purchaser, and the used car dealer mailed a title application on behalf of the purchaser to the State of Wisconsin Department of Motor Vehicles (See government's brief p. 2).

When the Wisconsin Department of Motor Vehicles received complaints about the cars that petitioner had sold, the government investigator turned to the title records that had been mailed to the DMV in order to trace the vehicle histories. (See government's brief p. 3.) The investigator obtained the addresses of the owners of the vehicles prior to petitioner, and obtained the odometer statements that the prior owners had prepared before petitioner had rolled back the odometers, (Joint App. p. 38). A simple comparison of the prior odometer statements with the odometer statements on the title applications that the used car dealers submitted showed that a roll back had occurred.

Without the title history that was mailed to the Department of Motor Vehicles, nothing could have been done about the consumer complaints that were received. Knowledge of the prior owners' addresses was preserved only in the title records.

At the risk of belaboring an obvious point, title registration laws are designed for the purpose of maintaining

records to enhance the ability of the government to prosecute crimes of the sort petitioner was engaged in. When Congress passed the Truth in Mileage Act, P.L. 99-579, (100 Stats. 3309), which raised the penalty for odometer tampering to a maximum of 3 years imprisonment and a maximum fine of $50,000,00, and which mandated disclosure and reporting of odometer mileage on titles, the debates and reports reflected a legislative intent to use title registration to detect and prosecute odometer fraud. See 131 Cong. Rec. S17654 - S17655; Sen. Danforth said the bill would close loopholes in the titling laws so consumers are better informed about true mileage, Sen. Gorton said the bill would make it easier to detect and prosecute odometer fraud, Sen. Exon said the bill would create a uniform "paper trail" of odometer readings to help trace and identify fraud, and Sen. Holling said the bill would reduce fraud by tighter control of registration and titling. See also 132 Cong. Rec. H9242 - H 9243; Mr. Rinaldo said the bill would aid law enforcement and prosecutors by creating a document trail, making odometer tampering more easily detected, and Mr. Bryant said that a major barrier to fighting odometer fraud was the lack of a paper trail. In addition, the Senate report on the bill, S.R. 99-47, describes the purpose of the law as to create a mechanism through which odometer tampering can be traced and prosecuted. 15 USC § 1981, the Congressional Findings and Declaration of Purpose for the odometer tampering statute, declares one of the purposes of the law to be establishing safeguards to protect purchasers from odometer tampering.

II. MAIL FRAUD CANNOT BE PREMISED ON COUNTERPRODUCTIVE MAILINGS.

The government's argument, by which these title records become the hook to hang a mail fraud conviction on,

is labored in the extreme. The government ignores the settled doctrine of this Court that the federal mail fraud statute does not reach all frauds, *Kann* v. *United States*, 323 U.S. 88 (1944), and that the showing, however convincing, that other crimes were committed does not establish mail fraud, *Parr* v. *United States*, 363 U.S. 370 (1960).

Supposedly, petitioner needed to have the titles to the cars he sold registered in order to continue selling cars. (See government's brief pp. 12-13). The government inadvertently concedes the pointlessness of that argument on page 12 of the government's brief, where they state:

"In order to complete the fraudulent transaction, petitioner had to ensure that the retail customers would purchase petitioner's cars *without realizing that the odometers on those cars had been tampered with* (emphasis added).[1]

The registration of title *in no way* depended upon the veracity of the odometer reading. The dealers and purchasers who bought the cars got valid titles. They did not rely on the fact that the title was good to reassure them that the odometer reading was true. They were not lulled into accepting petitioner's rolled back odometers by the fact that title registration occurred without problems. They registered the titles because the law requires title registration, and when they complained about the cars,

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[1] See also government's brief, pp. 17-18; "If the titles were not issued, the sales could not be made, and petitioner's continuing business with the dealers would rapidly come to a halt. By providing the means by which the victims could take legal custody of the cars, the issuance of titles made it possible for the petitioner's scheme to succeed, *with the victims none the wiser* (emphasis added).

the title records were the sole means of obtaining proof of petitioner's fraud.

The precedents upholding mail fraud convictions for odometer tampering are recent in origin. The seminal case, *United States* v. *Shryock*, 537 F.2d 207 (5th Cir.), *cert denied*, 429 U.S. 1100 (1976), is a two page opinion which deals with the "essential nature" of title registration to odometer tampering in one paragraph lacking relevant authority. *United States* v. *Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied* 456 U.S. 1006 (1982), relies on *Shryock*, and contains a strong dissent. *United States* v. *Fallon*, 776 F.2d 727 (7th Cir. 1985) and *United States* v. *Henson*, 848 F.2d 1374 (6th Cir. 1988) rely on *Galloway*. *United States* v. *Locklear*, 829 F.2d 1314 (4th Cir. 1987) cites no relevant authority.

The government repeatedly asserts that the victims of petitioner's scheme were the retail customers and not the used car dealers, (government brief pp. 8, 12, 17, 19). This is contrary to the indictment and proof.

In paragraph 9 of the indictment, it is charged that "the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage reading . . . . and further that the Wisconsin dealers and Wisconsin customers would and did pay more for each automobile than would have been paid if the odometer mileage reading had not been altered," (Joint App. p. 5).

Even if the used car dealers suffered no direct economic harm because they resold the cars at inflated prices to their retail customers (see government's brief p. 12, footnote 6), their business reputations and good will suffered when their irate customers discovered that they had been sold "tainted goods."

In fact, petitioner's gain on any particular automobile would have been realized even if, while in the dealer's hands, the car was wrecked or stolen and never resold at all.

If the government's argument is accepted, it follows that since titling a car is essential to selling it, and selling a car is essential to profiting from rolling back the odometer, every time an odometer is rolled back, mail fraud is committed. Somewhere down the line of subsequent ownership, someone who relied on the false odometer reading is going to re-title the car by mail.

The government misreads the holdings in *Kann* v. *Untied States*, 323 U.S. 88 (1944), *Parr* v. *United States*, 363 U.S. 370 (1960) and *United States* v. *Maze*, 414 U.S. 395 (1974). The mailings in each of those cases occurred during the time period that the defendant's criminal activities were ongoing. The government's assertion that this Court found that the schemes had ended "at the time when the charged mailings occurred" is erroneous (government's brief p. 17). The reason that the mailings in *Kann*, *Parr*, and *Maze* did not support the mail fraud charges is that the mailings *contributed nothing to the success of the ongoing fraud*, and, in *Maze*, were *counterproductive*.

The government argues that counterproductive mailings, and routine, innocent mailings, are sufficient to support mail fraud, see government's brief pp. 8, 10, 14, 15.[2] In this case, the sole purpose of the mailings was to

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[2] E.g., "As a legal matter, the case would not stand differently even if the information in the title applications had led directly to petitioner's apprehension. The mail fraud statute does not suggest that a mailing is outside the statute simply because the mailing might aid investigators in uncovering or proving the existence of the scheme," government's brief p. 14.

preserve records for future use against petitioner. The government is seeking to overrule *Maze* with its argument.

Some of the cases the government cites in support of overruling *Maze*, *Kann* and *Parr*, i.e. *United States* v. *Green*, 786 F.2d 247 (7th Cir. 1986), *United States* v. *Mitchell*, 744 F.2d 701 (9th Cir. 1984), *United States* v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983), *cert. denied*, 466 U.S. 974 (1984), and *United States* v. *Gorny*, 732 F.2d 597 (7th Cir. 1984) were prosecuted on the "clean and honest government" theory rejected by this Court in *McNally* v. *United States*, 483 U.S. ___, 97 L.Ed.2d, 292 (1987). In any event, the cases don't discuss the "counterproductive mailings" rule at all.

Of the other authorities cited by the government on this issue, in *United States* v. *Bernhardt*, 840 F.2d 1441 (9th Cir. 1988) the mailings contained checks which the defendant converted; in *United States* v. *Clark*, 649 F.2d 534 (7th Cir. 1981) dividend checks were mailed to the victim to lull her into accepting the legitimacy of defendant's phony investment scheme; in *United States* v. *Bright*, 588 F.2d 504 (5th Cir.), *cert denied*, 440 U.S. 972 (1979) a forged will was published by mailings; in *United States* v. *Dowling*, 739 F.2d 1445 (9th Cir. 1984), reversed on other grounds, 473 U.S. 207 (1985) defendant solicited orders, and filled them, through the mail; and in *United States* v. *Serino*, 835 F.2d 924 (1st Cir. 1987) defendant submitted inflated invoices as a part of a fire insurance fraud scheme.

Only in *United States* v. *Serino*, *supra*, is counterproductivity discussed. In that case, the phony invoices which the defendant submitted in support of his claim aroused the suspicions of the insurance company's

attorney, who nevertheless forwarded the invoices for consideration, along with a letter expressing the attorney's doubts.

In *Serino*, the purpose of the false invoices was to induce payment of the inflated claim. The suspicions aroused by the invoices did not negate their purpose, although the net effect was that the defendant's scheme was only an attempted fraud, not a completed fraud.

Serino recognizes the continued vitality of the rule that counterproductive mailings do not sustain mail fraud. The facts of each case must be analyzed independently to determine if the mailing in question furthered the scheme. Thus, the government's facile conclusion that the "routine" mailings in *Carpenter* v. *United States*, 484 U.S. ___, 98 L.Ed.29 275 (1987) and *United States* v. *Sampson*, 371 U.S. 75 (1962) support the convictions in the present case (government's brief p. 11) ignores the context of these cases. In *Carpenter* and *Sampson*, a specific reaction of third parties to the mailings was necessary or helpful to the fraudulent scheme. The mailings were more than "routine" for specific, articulable reasons.

In the present case, the government concedes that the title registration law hindered, rather than helped, petitioner (government brief pp. 14-15), but then argues inconsistently that the success of petitioner's scheme depended on compliance with the very law which tripped him up. In reality, few factual situations present more clearly counterproductive mailings than title registrations in odometer tampering cases.

III. THE FACTS OF THIS CASE REQUIRE A LESSER INCLUDED OFFENSE INSTRUCTION ON ODOMETER TAMPERING.

The government's argument in support of the "statutory elements" test for lesser included offenses begins

with a misconstruction of the facts of this case. The government adopts the erroneous statement of the *en banc* opinion that the indictment did not charge the essential elements of odometer tampering (see government's brief p. 6 and footnote 5, p. 7 and Joint App. p. 91). As previously demonstrated by petitioner, and acknowledged in the panel decision, paragraph 4 of the indictment charged the elements of odometer tampering (see petitioner's brief pp. 29-30 and Joint App. p. 72).

Thus, it is not correct to say, as the government does, that the indictment did not allege that petitioner actually altered the odometers.

The government argues that, since the "statutory elements" test is used to determine if an offense is a "lesser included offense" in double jeopardy cases, the same test should be used in jury instruction decisions. Of course, as the government concedes in footnote 8, page 19 of its brief, the fact that one offense is subsumed in the statutory elements of a greater offense does not prohibit conviction for both offenses, if the legislative intent is to impose double punishment, *Garrett* v. *United States*, 471 U.S 773 (1985).

Thus, the government concedes that the "statutory elements" test is *not* the determining factor in double jeopardy, and there is obviously no reason to make the "statutory elements" test the determining factor in jury instruction cases.

Judge Flaum's dissent expresses petitioner's arguments on this point more aptly than petitioner can:

> The majority also opines that it "seems desirable" that the same test be used for determining whether a lesser offense instruction should be given and for determining whether cumulative punishment and/or

separate trial is permissible on two charged offenses. *Supra* p. 13. I do not see why this identity is required. If a more expansive test is used for instruction purposes, the result will be that in some cases both instructions will be allowed where the two offenses could be punished cumulatively or tried separately, i.e. where they are "separate" offenses under the elements test. I do not foresee any undesirable consequences flowing from this eventuality. If a defendant in such a case is acquitted on both charges he cannot be retried on either, not because of their relationship but because the acquittal itself acts as a bar. The same is true if the defendant is only convicted of the lesser offense; he could not be retried on the greater because his lesser conviction represents an implied acquittal on the greater charge. If he is convicted of the greater offense there is a theoretical possibility that the government could retry him on the lesser charge (because the jury never considered it), but this is highly unlikely. Of course, in a case such as the one I have just described the prosecution presumably would be free to charge both offenses initially and to seek consecutive sentences thereon.

(Joint App. p. 104, footnote 1)

The government also complains about the infringement on its prerogative to determine what charge to bring against petitioner, (see government's brief pp. 26-27). What little point there is to this argument vanishes when you realize that the decision by the Court to charge a lesser offense under the "statutory elements" test also "preempts" the charging decision of the prosecutor and the grand jury. The government can't seriously argue that federal judges will deliberately undermine well-proven cases with frivolous lesser instructions.

Since the government argues for a "statutory elements" test, which precludes considering the facts of a particular case, it is no surprise that in this case the government

doesn't discuss how a weak mail fraud case was bolstered by copious proof of odometer tampering, backed up with the prosecutor's argument that petitioner would escape all punishment if not convicted of mail fraud (see petitioner's brief, p. 28).

The government wishes to exclude from consideration "the inferences that might reasonably be drawn from the evidence at trial," (government's brief p. 25), and focuses instead on the academic points that "A jury instruction on a lesser included offense does not, *in the abstract* (emphasis added) favor either the defendant or the government" (government's brief p. 28) and "It is . . . . by no means clear that, *as a general matter* (emphasis added), the 'inherent relationship' test is more favorable to defendants than the 'elements' test; *a fortiori*, it is unclear that the inherent relationship test is any 'fairer' than the traditional approach" (government's brief p. 29).

This case is not about abstractions. This Honorable Court must rule on what is fair to petitioner, on the facts of this case. The fact is that petitioner's conviction was secured by the kind of appeal to prejudice which this Court recognized as improper in *Keeble* v. *United States*, 412 U.S. 205 (1973).[3]

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[3] The government resorts to the *ad hominem* argument that if petitioner wins his challenge to his mail fraud conviction, he will be gratified that a lesser instruction on odometer tampering was not given. Petitioner has had these felony convictions hanging over his head for 5 years. If it turns out that the convictions were improper, the government should accept the outcome gracefully. After all, the defendant in *United States* v. *Coia*, 755 F.2d 595 (7th Cir. 1985), who was convicted under the "inherent relationship" rule, didn't get released from prison when the Seventh Circuit subsequently changed its mind.

The "inherent relationship" test is the better test because it reaches cases, like the present one, where justice demands some limit on prosecutorial overreaching and overcharging.

IV. CONCLUSION

For the foregoing reasons, petitioner's convictions should be reversed, and a judgment of acquittal entered, or at least a new trial ordered, with directions to instruct the jury on the lesser included offense of odometer tampering.

Respectfully submitted,

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